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No. 92-1223-CFX Title: United States Department of Defense, et al.,  
Status: GRANTED Petitioners  
v.  
Federal Labor Relations Authority, et al.

Docketed:  
January 19, 1993 Court: United States Court of Appeals for  
the Fifth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Kirsch, Stuart A., Smith, David M.,  
Roth, Mark D.

Entry	Date	Note	Proceedings and Orders
1	Jan 19 1993	G	Petition for writ of certiorari filed.
3	Feb 3 1993		Order extending time to file response to petition until March 8, 1993.
5	Mar 5 1993		Memorandum of respondent Federal labor Relations Authority filed.
4	Mar 8 1993		Brief of respondent American Federation of Government Employees, AFL-CIO in support of petition filed.
6	Mar 10 1993		DISTRIBUTED. March 26, 1993
7	Mar 29 1993		Petition GRANTED.
12	Apr 16 1993		***** Record filed.
	*		Certified copy of Joint Appendix submitted by FLRA to the U. S. C. A. -Fifth Circuit.
8	Apr 28 1993	G	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
9	May 13 1993		Brief of petitioner United States Department of Defense, et al. filed.
10	May 13 1993	G	Motion of National Right to Work Legal Defense Foundation, Inc. for leave to file a brief as amicus curiae filed.
11	May 18 1993	*	Record filed.
	*		Partial proceedings United States Court of Appeals for the Fifth Circuit (BOX)
13	May 24 1993		Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
15	Jun 4 1993		Order extending time to file brief of respondent on the merits until July 2, 1993.
16	Jun 21 1993		Motion of National Right to Work Legal Defense Foundation, Inc. for leave to file a brief as amicus curiae GRANTED.
17	Jun 25 1993		Brief of respondent FLRA filed.
18	Jul 1 1993		Brief amicus curiae of National Treasury Employees Union filed.
19	Jul 2 1993		Brief of respondent American Federation of Government Employees, AFL-CIO filed.
20	Aug 5 1993		Reply brief of petitioners FLRA, et al. filed.
21	Aug 16 1993	D	Motion of respondent American Federation of Government Employees, AFL-CIO for leave to file motion for divided argument filed.
22	Sep 10 1993		SET FOR ARGUMNET MONDAY, NOVEMBER 8, 1993. (1ST CASE).

No. 92-1223-CFX

Entry	Date	Note	Proceedings and Orders
23	Sep 16 1993		CIRCULATED.
24	Sep 24 1993		Motion of respondent American Federation of Government Employees, AFL-CIO for leave to file motion for divided argument DENIED.
25	Nov 8 1993		ARGUED.

92-1223

No.

Supreme Court, U.S.

FILED

JAN 21 1993

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF  
NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, AND THE  
U.S. DEPARTMENT OF DEFENSE, ARMY AND AIR  
FORCE EXCHANGE, DALLAS, TEXAS, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND  
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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83-19

**QUESTION PRESENTED**

Whether the Privacy Act of 1974 protects the home addresses of federal employees from disclosure.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

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No.

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF  
NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BAT-  
TALLION CENTER, GULFPORT, MISSISSIPPI, AND THE  
U.S. DEPARTMENT OF DEFENSE, ARMY AND AIR  
FORCE EXCHANGE, DALLAS, TEXAS, PETITIONERS

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FEDERAL LABOR RELATIONS AUTHORITY AND  
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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The Solicitor General, on behalf of the U.S. Department of Defense, U.S. Department of Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi, and the U.S. Department of Defense, Army and Air Force Exchange, Dallas, Texas, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

(1)

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 975 F.2d 1105. The opinions of the Federal Labor Relations Authority (App., *infra*, 37a-42a and 52a-57a) are reported at 37 F.L.R.A. 652 and 37 F.L.R.A. 930.

### JURISDICTION

The judgment of the court of appeals was entered on October 9, 1992. A petition for rehearing was denied on December 7, 1992. Pet. App. 35a-36a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES INVOLVED

1. The pertinent provisions of the Freedom of Information Act, 5 U.S.C. 552, states:

(b) This section does not apply to matters that are—

\* \* \* \*

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information \* \* \* (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]

2. The Privacy Act of 1974, 5 U.S.C. 552a(b), states, in pertinent part:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another

agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

\* \* \* \*

(2) required under section 552 of this title [FOIA];

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section[.]

3. The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7114, provides, in pertinent part:

(b) the duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

\* \* \* \*

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

\* \* \* \*

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]

### STATEMENT

1. This case arises out of requests by two unions for, among other things, the home addresses of federal employees in the bargaining units represented by the unions. Both cases happen to involve employ-

ees of military exchanges.<sup>1</sup> In each case, the agency provided the names and work stations of members of the bargaining unit, but not their home addresses. C.A. App. 58, 60, 113. In declining to provide the home addresses, the agencies relied on the Privacy Act of 1974, which states that, in general, “[n]o agency shall disclose any record \* \* \* except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.” 5 U.S.C. 552a(b). In both cases, the Federal Labor Relations Authority (FLRA) concluded that the agency had committed an unfair labor practice. App., *infra*, 37a-42a, 52a-57a.

2. a. The court of appeals enforced the FLRA’s orders compelling the disclosure of the home addresses of the members of the bargaining units. The court recognized that “[i]n general, the Privacy Act, 5 U.S.C. § 552a, prohibits the disclosure of personal information about federal employees without their consent.” App., *infra*, 10a. However, the court added, an exception to the Privacy Act, 5 U.S.C. 552(b)(2), authorizes the disclosure of information contained in agency records if disclosure “would be \* \* \* required under section 552 of this title,” the Freedom of Information Act (FOIA). FOIA, in turn, generally requires the disclosure of agency documents, although FOIA Exemption 6 protects from disclosure “personnel and medical files and similar files the dis-

closure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. 552 (b)(6). The court accordingly turned to whether disclosure of the employees’ home addresses would constitute a “clearly unwarranted invasion of personal privacy” within the meaning of FOIA Exemption 6.

Prior to this Court’s decision in *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the court of appeals emphasized, a number of courts had concluded that unions representing federal employees were entitled to obtain the home addresses of bargaining unit members. Those courts weighed the public interest in promoting collective bargaining by federal employees against the employees’ interest in protecting their home addresses from disclosure, and held that disclosure was warranted. App., *infra*, 9a-16a. In *Reporters Committee*, however, which involved a request by a reporter for an FBI “rap sheet,” the Court stressed that FOIA “focuses on the citizens’ right to be informed about ‘what their government is up to.’” 489 U.S. at 773. In that case, the Court held that disclosure was not warranted because “the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records” and a response “would not shed any light on the conduct of any Government agency or official.” *Ibid.* Following *Reporters Committee*, as the court of appeals in this case acknowledged, App., *infra*, 15a-16a n.4, a number of circuits held that FOIA does not provide for the disclosure of the home addresses of federal em-

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<sup>1</sup> One request was made by Local 1657 of the United Food and Commercial Workers Union, which represents employees at the Navy Exchange in Gulfport, Mississippi. The other request was made by Local 1345 of the American Federation of Government Employees, which represents employees of the Army and Air Force Exchange Service, which is based in Dallas. App., *infra*, 2a-3a.

ployees, since home addresses do not disclose what the government is "up to."<sup>2</sup>

But the court of appeals concluded that those circuits "have read too much into *Reporters Committee*," App., *infra*, 18a, and agreed with those courts that have held that federal agencies must disclose employees' home addresses.<sup>3</sup> The court suggested two bases on which *Reporters Committee* may be distinguished. First, *Reporters Committee* involved FOIA Exemption 7(C) rather than FOIA Exemption 6. Exemption 7(C) protects records compiled for law enforcement purposes from disclosure, "but only to the extent that the production of such law enforcement records \* \* \* could reasonably be expected to

<sup>2</sup> The court cited *FLRA v. Department of the Navy, Navy Exchange*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of the Navy, Navy Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA v. Department of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. United States Dep't of the Navy, Naval Communications Unit*, 941 F.2d 49 (1st Cir. 1991); and *FLRA v. U.S. Dep't of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990). Since the decision in this case, the Eleventh Circuit also has rejected the FLRA's position. *FLRA v. U.S. Dep't of Defense*, 977 F.2d 545 (1992).

<sup>3</sup> The court noted (App., *infra*, 16a-17a n.4) that panels in the Ninth Circuit and the Fourth Circuit had granted enforcement of FLRA orders requiring the disclosure of home addresses. *FLRA v. United States Dep't of the Navy, Navy Resale & Support Servs. Office*, 958 F.2d 1490 (9th Cir. 1992), petition for reh'g pending; *FLRA v. United States Dep't of Commerce, NOAA*, 954 F.2d 994 (4th Cir. 1992), vacated and reh'g granted (Apr. 22, 1992). The court also noted that the en banc Third Circuit had upheld an FLRA disclosure order. *FLRA v. U.S. Dep't of the Navy, Navy Ships Parts Control Center*, 966 F.2d 747 (1992). However, the court's holding in that case was not based on FOIA Exemption 6. See note 6, *infra*.

constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Exemption 6 differs from Exemption 7(C), the court of appeals noted, in two ways: while "Exemption 6 mandates that the invasion of privacy be 'clearly unwarranted,' Exemption 7(C) requires that the invasion of privacy be merely 'unwarranted,'" and "while Exemption 6 applies to disclosures which 'would constitute' an invasion of privacy, Exemption 7(C) pertains to disclosures which 'could reasonably be expected to constitute' such an invasion." App., *infra*, 19a-20a. The court did not elaborate on the significance of those differences.

Second, the court of appeals stated, this case differs from *Reporters Committee* since "the unions' disclosure requests in this case do not arise under the FOIA." App., *infra*, 20a. Rather, the court continued, "their requests originate from within the FLRS [the Federal Service Labor-Management Relations Statute] and its Congressionally endorsed framework for protecting and promoting collective bargaining." *Ibid.* The court concluded that "*Reporters' Committee* is limited to the situation that arises when disclosure is sought under the FOIA alone." *Id.* at 23a. Once the interest in promoting collective bargaining is considered, the court held, "disclosure of the employees' names and addresses would not constitute a clearly unwarranted invasion of privacy, and is not prohibited by the Privacy Act." *Id.* at 26a. Thus, the court enforced the FLRA's order even though it "acknowledged that if one applies the restrictions announced in *Reporters' Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited." *Id.* at 19a.

b. Judge Emilio Garza dissented. Although the FLRS provides that federal agencies must furnish unions with information "which is reasonably available and necessary for \* \* \* collective bargaining," he noted, it provides that they may do so only "to the extent not prohibited by law." 5 U.S.C. 7114 (b)(4)(B). Since all agree that the Privacy Act would prohibit the disclosure of employees' home addresses unless disclosure is mandated by FOIA, Judge Garza continued, the question in this case turns on whether FOIA Exemption 6 requires disclosure. Contrary to the majority, Judge Garza saw no basis for weighing collective bargaining considerations in the balance under Exemption 6, since those considerations have nothing to do with what the government is "up to." App., *infra*, 30a-34a.

Also contrary to the majority, Judge Garza found no reason to distinguish *Reporters' Committee* on the ground that Exemption 6 differs in some respects from Exemption 7(C). "The difference between Exemption 6 and 7(C) goes only to the degree of personal privacy needed to outweigh the public interest," he explained, while "the public interest factor remains the same under both exemptions." App., *infra*, 30a. Since the unions' request in this case would not disclose anything about what the government is "up to" but would impinge on employees' privacy interests, Judge Garza would have denied the FLRA's applications for enforcement of its orders.

#### **REASONS FOR GRANTING THE PETITION**

This case presents a recurring issue on which there is an acknowledged conflict in the circuits, and the court of appeals in this case erroneously held that the

privacy interests of federal employees must be infringed by the release of their home addresses. Review by this Court is therefore warranted.

1. The Privacy Act bars the release of employees' home addresses. There is no dispute that, in the absence of an applicable exception, disclosure would violate the Privacy Act's requirement that "[n]o agency shall disclose any record \* \* \* except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. 552a(b). No exception to the Privacy Act authorizes courts to consider the interest in collective bargaining embodied in the FLRS. In addition, the FLRS expressly provides that federal agencies are to furnish information to unions only "to the extent not prohibited by law." 5 U.S.C. 7114(b)(4). Since the Privacy Act is a "law" that generally prohibits the disclosure of personal information by federal agencies and contains no exception relating to collective bargaining activities, the court of appeals erred by distinguishing *Reporters' Committee*, and basing its decision on the fact that the requests in this case were made by unions.<sup>4</sup>

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<sup>4</sup> In our view, the court of appeals also overstated the extent to which collective bargaining would be facilitated by disclosure of the employees' home addresses. The names and work stations of employees in the bargaining units were disclosed to the unions (see C.A. App. 58, 60, 113), and the additional disclosure of the employees' home addresses would facilitate collective bargaining only marginally, if at all. Moreover, the unions could have asked the employees to provide their home addresses. Had they done so, of course, the unions would have the home addresses only of those employees who wanted to provide their home addresses to the union. But the FLRA generally requires the disclosure of the home addresses

Nor does the fact that this case involves FOIA Exemption 6 rather than FOIA Exemption 7(C) provide a basis for distinguishing *Reporters Committee*. As Judge Garza explained, a weightier privacy interest may be required in some cases to protect information from disclosure under Exemption 6 than under Exemption 7(C). App., *infra*, 30a. But there is no dispute that a privacy interest is at stake in this case—the important interest in protecting the privacy of home and hearth. See *Rowan v. Post Office*, 397 U.S. 728, 737 (1970) (“[t]he ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality”). And there is no dispute that federal employees’ interest in protecting the privacy of their home outweighs the interest in disclosure unless the collective bargaining interest embodied in the FLRS is weighed in the balance, since the employees’ home addresses disclose nothing about what the government is “up to.” As the court of appeals acknowledged, “if one applies the restrictions announced in *Reporters’ Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited.” App., *infra*, 19a. See *U.S. Dep’t of State v. Ray*, 112 S. Ct. 541, 548 (1991), quoting *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (Exemp-

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of all employees in the bargaining unit, even employees who have asked that their home addresses be kept confidential. See *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 F.L.R.A. 514 (1990); *Farmers Home Administration Fin. Office*, 23 F.L.R.A. 788 (1986); App., *infra*, 46a-47a; p. 13, *infra*.

tion 6 “requires the Court to balance ‘the individual’s right of privacy’ against the basic policy of opening ‘agency action to the light of public scrutiny’ ”).

In short, the Privacy Act protects federal employees’ home addresses from disclosure unless FOIA requires their release. FOIA requires the release of information only when it discloses what the government is “up to,” not when disclosure promotes some other interest. The court of appeals therefore erred by ordering the release of the employees’ home addresses in this case.

2. Six circuits have correctly held that employees’ home addresses are protected from disclosure by the Privacy Act. *FLRA v. U.S. Dep’t of Defense*, 977 F.2d 545 (11th Cir. 1992); *FLRA v. Department of the Navy, Navy Exchange*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of the Navy, Naval Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA v. Department of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. U.S. Dep’t of the Navy, Naval Communications Unit*, 941 F.2d 49 (1st Cir. 1991); *FLRA v. U.S. Dep’t of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990). The court of appeals in this case acknowledged that its decision cannot be reconciled with the decisions of those other circuits. App., *infra*, 15a-16a & n.4. Two other courts have agreed with the court of appeals in this case, although one of those decisions was vacated. *FLRA v. U.S. Dep’t of the Navy, Navy Resale & Support Servs. Office*, 958 F.2d 1490 (9th Cir. 1992), petition for reh’g pending; *FLRA v. Department of Commerce, NOAA*, 954 F.2d 994 (4th Cir. 1992), vacated and reh’g granted (Apr.

22, 1992).<sup>5</sup> The issue on which the courts are split is squarely presented by this case.<sup>6</sup>

<sup>5</sup> Because a rehearing petition has been granted or is pending in those circuits, we have advised the Fourth and Ninth Circuits that the Solicitor General has authorized the filing of a petition for a writ of certiorari in this case. The Fifth Circuit's denial of rehearing en banc makes clear that the question presented will not be resolved unanimously by the courts of appeals.

<sup>6</sup> In *FLRA v. U.S. Dep't of the Navy, Navy Ships Parts Control Center*, 966 F.2d 747 (1992), the en banc Third Circuit upheld the FLRA's position on the basis of the "routine use" exception to the Privacy Act, 5 U.S.C. 552a(b)(3), a provision which authorizes disclosure "for a purpose which is compatible with the purpose for which it was collected," 5 U.S.C. 552a(a)(7), and in accordance with a "routine use" regulation, 5 U.S.C. 552a(e)(4)(D). A majority of the en banc court (seven of twelve) held that release was authorized by a "routine use" regulation promulgated by the Office of Personnel Management (OPM) (see 49 Fed. Reg. 36,949, 36,956 (1984)), even though OPM had interpreted its routine use regulation to bar the release of home addresses unless unions have no other reasonable method of reaching bargaining unit members. The en banc court said that "until the OPM publishes its interpretation in a manner sufficient to place the public on notice of both the existence and content of that interpretation, we will not defer to the OPM's interpretation." 966 F.2d at 762. In response, OPM in September 1992 published its interpretation of its routine use regulation in Federal Personnel Manual Letter 711-164. The FLRA has since recognized that "FFP Letter 711-164 governs interpretation" of the routine use regulation. *U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 46 F.L.R.A. No. 22, slip op. 10 (Oct. 23, 1992). Accordingly, there is no longer a basis for the argument that disclosure of home addresses is generally permissible under OPM's "routine use" regulation, and the only question bearing on the controversy is whether the Privacy Act authorizes disclosure of home addresses under FOIA. (Six of the twelve members of the en banc Third Circuit—that is, less than a majority—agreed

The question presented is plainly a recurring issue. It is also an issue of considerable importance to federal employees, who may have specific concerns about releasing their home addresses to unions ranging from the inconvenience of receiving unsolicited mail at home to the possibility of harassment by the union at home. For example, in *Department of the Navy, U.S. Naval Ordnance Station*, 33 F.L.R.A. 3, 5 (1988), an affidavit filed before the FLRA included a statement by an employee that he wanted his home address to be kept private because he had been threatened at home by a union member; the FLRA nevertheless ordered the release of the home addresses of all members of the bargaining unit. Furthermore, it is clear that many federal employees do not want their home addresses disclosed to unions. In *Veterans Administration, Riverside National Cemetery*, 33 F.L.R.A. 316, 317 (1988), for example, 22 of the 34 members of the bargaining unit asked the agency to keep their home addresses confidential; the FLRA ordered their release to the union anyway.

Finally, aside from the more than 60 home address cases decided by the FLRA, the question presented affects other important issues. For example, the FLRA has ordered the release of unsanitized employee disciplinary files and performance ratings, despite the Privacy Act, on the ground that release is required so that unions may fulfill their responsibilities under the FLRS. *U.S. Dep't of Labor*, 39 F.L.R.A. 531 (1991), remanded on other grounds, No. 91-1174 (D.C. Cir. order of Jan. 7, 1992) (unredacted suspension records); *U.S. Dep't of Health*

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with the FLRA's position with respect to FOIA Exemption 6, while five members of the court disagreed and one did not reach the issue.)

and Human Services, Social Security Administration and Social Security Administration Field Operations, 43 F.L.R.A. 164 (1991), rev'd, No. 92-1012 (D.C. Cir. Dec. 10, 1992) (unredacted performance appraisals); see also *U.S. Department of Energy*, 41 F.L.R.A. 1241, 1252-1253 (1991), appeal pending, No. 91-1514 (D.C. Cir.) (names of employees suspected of illegal drug use). But under *Reporters Committee*, such records are properly subject to disclosure only if what they reveal about what the government is "up to" outweighs the privacy interests sacrificed by disclosure. In short, in addition to ordering federal agencies to disclose employees' home addresses to unions, the FLRA has used the approach approved by the court of appeals in this case to order the disclosure of a broad array of personal information.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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#### APPENDIX A

#### IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 90-4722

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FEDERAL LABOR RELATIONS AUTHORITY,  
PETITIONER-CROSS-RESPONDENT

*versus*

UNITED STATES DEPARTMENT OF DEFENSE, UNITED  
STATES DEPARTMENT OF THE NAVY, WASHINGTON,  
D.C., AND NAVY CBC EXCHANGE, CONSTRUCTION  
BATTALION CENTER, GULFPORT, MISSISSIPPI, RE-  
SPONDENTS-CROSS-PETITIONERS

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No. 90-4775

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FEDERAL LABOR RELATIONS AUTHORITY,  
PETITIONER-CROSS-RESPONDENT

*versus*

UNITED STATES DEPARTMENT OF DEFENSE,  
ARMY AND AIR FORCE EXCHANGE, DALLAS, TEXAS,  
RESPONDENT-CROSS-PETITIONER

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Applications for Enforcement and Cross-Petitions  
for Review of Orders of the  
Federal Labor Relations Authority

[Filed October 9, 1992]

Before KING, JOHNSON, and EMILIO M. GARZA,  
Circuit Judges.

JOHNSON, Circuit Judge:

In these two cases two labor organizations who represent federal employees requested that the federal agencies disclose to the unions the names and home addresses of all of the employees in the relevant bargaining units. The employer agencies refused, and the unions filed unfair labor practice charges with the Federal Labor Relations Authority (FLRA). The FLRA ordered the employers to disclose the names and addresses, and has applied to this Court for enforcement of its orders. The federal agency employers have petitioned for review of those orders.

**I. Facts and Procedural History**

The facts of these two cases are virtually identical. The United Food and Commercial Workers Union, Local 1657, represents a bargaining unit composed of all regular full-time and part-time employees, and all intermittent employees of the Navy Exchange in Gulfport, Mississippi. In August 1988 the union requested that the Navy Exchange disclose to it the names and home addresses of all of the employees in its bargaining unit. The Navy Exchange refused the

union's request. The union responded by filing an unfair labor practice charge with the FLRA. The FLRA ruled in favor of the union, and ordered the Navy Exchange to cease and desist from refusing to furnish the names and home addresses of all employees in the bargaining unit the union represents. In case No. 90-4722 the FLRA and the Navy Exchange seek enforcement and review of that order.

The American Federation of Government Employees, Local 1345, represents a consolidated, worldwide bargaining unit composed of all regular full-time and part-time employees, and all intermittent employees of the Army and Air Force Exchange Service, which is headquartered in Dallas, Texas, and operates a facility at Lowry Air Force Base in Colorado. In October 1988 the union requested that the Exchange disclose to it the names and home addresses of all of bargaining unit employees working at the Post Exchange at Lowry AFB. The Exchange denied the request, and the union filed an unfair labor practice charge with the FLRA. The FLRA ordered the Exchange to disclose the names and addresses. In No. 90-4775 the FLRA and the Exchange seek enforcement and review of the FLRA's order.

**II. Discussion**

Because the disputes in these cases arise out of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*, it is helpful to begin with a review of that statute and certain of the duties and obligations it places on labor organizations and federal employers.

**A. The Federal Service Labor-Management Relations Statute**

In adopting the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*, (the "FLRS"), Congress observed that

experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment.

5 U.S.C. § 7101(a)(1). "Therefore," the Congress declared, "labor organizations and collective bargaining in the civil service are in the public interest."

To facilitate collective bargaining in the public sector, the FLRS provides that a labor organization may serve as the exclusive bargaining representative of a group of public employees as long as it fulfills certain duties. In particular, the FLRS provides that "[a]n exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1). That is, the labor organization must represent the interests not only of its dues-paying members, but also the interests of those employees in the unit who choose not to join the union. Thus, the requests by the unions in this case for the names and addresses of employees in the relevant bargain-

ing units were requests designed to allow the union to contact not its own members, but rather the other employees in the units, so that the unions could determine what issues were of concern to those employees.

The FLRS also imposes obligations on the employer. For instance, in order to facilitate the bargaining process, federal employers are required

to furnish to the exclusive representative involved, or its authorized representative, upon request and to the extent not prohibited by law, data which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.

5 U.S.C. § 7114(b)(4)(B).

The FLRA has taken the position that the names and addresses of employees in the bargaining unit is data which is "reasonably available and necessary" to the process of collective bargaining. The FLRA first took this position in its decision in *Farmers Home Administration Finance Office v. American Federation of Government Employees, Local 3354*, 23 FLRA 788 (1986) ("Farmers Home Administration"), when it observed that

[s]ection 7114(a)(1) of the [FLRS] provides that an exclusive representative is responsible for representing the "interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." Under this provision, a union's statutory responsibilities extend to all bargaining unit members. It is obvious that a union must be

able to identify and communicate with those bargaining unit members if it is to adequately represent them.

*Id.* at 796. The FLRA thus concluded that disclosure of the names and addresses was necessary because it would “enable the Union to communicate effectively and efficiently, through direct mailings to individual employees.” *Id.* Moreover, the FLRA held, the existence of alternative means of communication—such as desk drops, direct distributions, meetings, bulletin boards, and direct personal contacts—“is insufficient to justify a refusal to release the [names and addresses].” *Id.* This is so

because the communication between unit employees and their exclusive representative which would be facilitated by release of names and home addresses . . . is fundamentally different from other communication through alternative means which are controlled in whole or in part by the [employer] agency. When using direct mailings, the content, timing, and frequency of the communication is completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union’s communication without regard to the time constraints inherent in their work environments, and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present.

*Id.* at 796-97. The FLRA has recently reaffirmed its position in *United States Dep’t of the Navy, Ports-*

*mouth Naval Shipyard v. International Federation of Professional & Technical Engineers, Local 4*, 37 FLRA 515, 523 (1990) (“*Portsmouth*”), and its orders in the two cases before this Court were based on the decisions in *Farmers Home Administration* and *Portsmouth*.

The FLRA’s determination that the names and addresses are necessary for full and proper collective bargaining has been uniformly upheld in the federal courts of appeals. Initially, because the FLRA’s position is one interpreting its own enabling statute, its interpretation cannot be upset by the federal courts as long as it is a “reasonable and defensible construction” of the statute. *Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89, 97, 104 S.Ct. 439 (1983). That is, the FLRA’s interpretation of the FLRS must be “given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782 (1984). See also *Department of Justice v. FLRA*, 939 F.2d 1170, 1173 (5th Cir. 1991) (FLRA is entitled to special deference when it exercises its special function of applying the general provisions of the FLRS to the complexities of federal labor relations).

There can be little question that the FLRA’s position is a reasonable one. Every court of appeals that has reviewed the FLRA’s determination that employees’ names and address are necessary has found that to be a reasonable construction of the statute, and has

upheld the FLRA's position. Most recently, the Ninth Circuit has ruled that it was not unreasonable for the FLRA to conclude that the employees' names and home addresses "are necessary so that the union's direct-mail literature can reach employees free of the mediation of the employer-controlled workplace." *FLRA v. United States Dep't of the Navy, Navy Resale & Services Support Office*, 958 F.2d 1490, 1494 (9th Cir. 1992). Similarly, the Second Circuit has recently held that "alternatives to [the] direct communication afforded by mailings to all unit members —such as workplace visits or the use of bulletin boards —are not such effective alternatives as to make the FLRA's insistence on [home] mailings an arbitrary or capricious position." *FLRA v. United States Dep't of Veterans Affairs, Veterans Affairs Medical Center*, 958 F.2d 503, 507-08 (2d Cir. 1992). While the D.C. Circuit also cited the advantages of home mailings over alternative means of communication, that Court further noted that the FLRA's position "corresponds to that of private sector labor relations law." *FLRA v. United States Dep't of Treasury, Financial Management Service*, 884 F.2d 1446, 1449 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990). Accordingly, the D.C. Circuit held the FLRA's interpretation was reasonable and should not be disturbed. *Id.*

At least three other circuits have also embraced the FLRA's position. See *United States Dep't of the Navy, Philadelphia Naval Shipyard v. FLRA*, 840 F.2d 1131, 1137-39 (3d Cir.), *cert. denied*, 109 S. Ct. 632 (1988) ("Because a union must have the information necessary to fulfill its statutory responsibility to represent all employees in the unit, we conclude that the FLRA did not err in holding that the

requested information is necessary . . .");<sup>1</sup> *United States Dep't of Agriculture v. FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 831 (1989) (FLRA's position is not arbitrary or capricious); *United States Dep't of Health and Human Servs., Social Security Administration v. FLRA*, 833 F.2d 1129, 1131-34 (4th Cir. 1987) ("Communication between the Union and bargaining unit employees appears to be as important to the performance of the Union's representational duties in the interim between negotiations as it is during negotiations[, and] . . . the Union cannot discharge its [statutory] obligation unless it is able to communicate with those in whose behalf it acts."). Indeed, in the face of this seamless expanse of authority, the federal agencies involved in this case do not contest the FLRA's position. They expressly acknowledge that the weight of authority supports the FLRA's view, and thus no longer dispute that the names and addresses of their employees are necessary to full and proper collective bargaining.

#### B. *The Previous Consensus that Employees' Names and Addresses Must be Disclosed*

Given that the parties, the FLRA, and the courts uniformly agree that the employees' names and home addresses are necessary to the full and proper con-

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<sup>1</sup> The Third Circuit has recently reaffirmed this conclusion. In *FLRA v. United States Dep't of the Navy, Navy Ships Parts Control Center*, — F.2d — (3d Cir. 1992) (en banc), our colleagues on that Court, sitting en banc, again ruled that "the FLRA's interpretation of what is necessary does constitute a permissible construction of the Labor Statute." — F.2d at —. (slip op. at 13).

duct of collective bargaining, the question then becomes whether disclosure of those names and addresses is, in the words of the FLRS, "prohibited by law." 5 U.S.C. § 7114(b)(4). Like the question of whether the employees' names and addresses are "necessary," at one time there was a broad consensus on the part of the FLRA and the federal courts that disclosure of those names and addresses was *not* prohibited by law.

The agencies have contended, over the life of this dispute, that disclosure of their employees' names and home addresses is "prohibited by law"—in particular, that disclosure is prohibited by the Privacy Act, 5 U.S.C. § 552a. In general, the Privacy Act, 5 U.S.C. § 552a, prohibits the disclosure of personal information about federal employees without their consent. 5 U.S.C. § 552a(b). The Privacy Act includes several exceptions, however, and it was well settled that one of these exceptions provided for the disclosure of the employees' names and addresses. Section 552a(b)(2) of the Privacy Act<sup>2</sup> states that the Privacy Act does not bar disclosures of information "required under section 552 of this title"—a reference to the Freedom of Information Act, 5 U.S.C. § 552 ('FOIA'). As noted, at one time every court that considered the question agreed that the FOIA did not prohibit disclosure of the employees' names and addresses.

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<sup>2</sup> The Privacy Act provides that

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be required under section 552 of this title . . .

5 U.S.C. 552a(b)(2).

Generally speaking, the FOIA, with certain enumerated exceptions, "embodies a general philosophy of full agency disclosure." *Halloran v. Veterans' Administration*, 874 F.2d 315, 318 (5th Cir. 1989) (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 360 (1976)). One of the exceptions to the FOIA's directive of full disclosure encompasses "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 522(b)(6). Determining whether disclosure of some piece of information would constitute a "clearly unwarranted invasion of personal privacy," and would therefore be exempt from disclosure under the FOIA, requires balancing the specific privacy interests implicated by the information against the particular public interests that may be served—or disserved—by disclosure of the information. *Halloran*, 874 F.2d at 319. This Court has noted that "Congress contemplated that in applying these exemptions, courts would reconcile these competing interests by balancing all while ignoring none." *Id.* To this end the Congress sought to provide a "workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." *Id.*

Although the Fifth Circuit did not address the issue, the courts of appeals that weighed the private and public interests involved in disclosure of employees' names and addresses to collective bargaining representatives uniformly held that the balance tipped in favor of the public interests in collective bargaining, and therefore in favor of disclosure. See *United States Dep't of the Navy, Philadelphia Naval Ship-*

*yard v. FLRA*, 840 F.2d 1131, 1137 (3d Cir.), cert. denied, 109 S. Ct. 632 (1988); *United States Dep't of the Air Force, Scott A.F.B. v. FLRA*, 838 F.2d 229, 232-33 (7th Cir.), cert. denied, 109 S. Ct. 632 (1988); *United States Dep't of Agriculture v. FLRA*, 836 F.2d 1139, 1143 (8th Cir. 1988), vacated and remanded, 109 S. Ct. 831 (1989); *United States Dep't of Health and Human Servs., Social Security Administration v. FLRA*, 833 F.2d 1129, 1135 (4th Cir. 1987); *American Federation of Government Employees, Local 1760 v. FLRA*, 786 F.2d 554, 556-57 (2d Cir. 1986).

Several considerations produced this consensus. Initially, the balancing itself does not present a particularly close question. On the one side of the scales is the weighty public interest in labor organizations and collective bargaining, an interest expressly identified and protected by Congress in the FLRS. Indeed, the Supreme Court has recognized that “[i]n passing the [FLRS] Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest.” *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107, 104 S. Ct. 439, 449 (1983). On the other side of the scales, on the other hand, is a considerably lighter interest in privacy. While all of the courts of appeals agreed that employees had at least some legitimate interest in keeping private their names and home addresses, those courts consistently concluded that disclosure of that information would have only a modest or marginal effect on employees’ privacy. *Dep't of the Navy, Philadelphia Naval Shipyard*, 840 F.2d at 1136 (“the invasion of privacy effected by such disclosure [of names and addresses] is not as

serious as it would be by the disclosure of more personal information”); *Dep't of the Air Force, Scott A.F.B.*, 838 F.2d at 232 (“Both the secrecy and the seclusion components of privacy . . . are minuscule here.”); *Dep't of Agriculture*, 836 F.2d at 1143 (average employee has only modest privacy interest in his home address); *AFGE, Local 1760*, 786 F.2d at 556 (“the privacy of the average employee in his address is not particularly compelling”).

About the most significant intrusion into employees’ privacy that could be identified by these courts—and by the agencies in this case—would be a possible increase in mail solicitations. As Judge Easterbrook has noted, however,

It is hard to see how the disclosure of home addresses could be “clearly unwarranted” as a rule. Most home addresses are in the telephone book, freely available to anyone interested. They are widely disseminated on mailing lists. And the mail that comes in response does not substantially impinge on seclusion; the addressee may send it to the circular file.

*Dep't of the Air Force, Scott A.F.B.*, 838 F.2d at 232. To the same effect is the Third Circuit’s recognition that “unwanted mailings are an unfortunate fact of our daily existence,” but that “our annoyance with them does not rise to a privacy interest that outweighs a statutorily mandated disclosure interest.” *FLRA v. Department of the Navy, Navy Ships Parts Control Center*, — F.2d —, — (3d Cir. 1992) (en banc) (slip op. at 29).

In addition, several of the courts of appeals took notice of the fact that employers in the private sector are required to disclose the names and addresses of

their employees to the unions that represent those employees,<sup>3</sup> and there is no apparent reason to apply a different rule here. It is well recognized that the FLRS is modeled on private labor law, *see Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92-93, 104 S. Ct. at 441-42, and that “[p]rivate sector labor-relations case law, although not strictly binding as precedent, generally provides strong guidance in parallel public sector matters.” *Dep’t of Treasury, Financial Management Service*, 884 F.2d at 1458 (Ginsburg, J., concurring). *See also Dep’t of Health & Human Servs., Social Security Administration*, 833 F.2d at 1132, 1132 n.4 (noting that Labor Management Relations Act of 1947, which governs private sector labor relations, shares similar purposes and concerns with the FLRS); *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987) (“Congress was fully aware of the analogy between the FLRS and the National Labor Relations Act, . . . Congress paid close attention to judicial precedent in private sector labor law when drafting the [FLRS].”).

Finally, the Supreme Court has repeatedly cautioned that the exceptions to the FOIA are to be construed narrowly, in favor of full disclosure. *See, e.g.*,

<sup>3</sup> *See, e.g., NLRB v. Associated Gen'l Contractors*, 633 F.2d 766, 773 (9th Cir. 1980) (disclosure of names and addresses required under 29 U.S.C. § 158(a)(5)’s duty to bargain in good faith); *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1113 (1st Cir. 1975) (same); *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1204 (2d Cir. 1970) (same), cert. denied, 401 U.S. 993, 91 S. Ct. 1232 (1971). Cf. *NLRB v. Wyman-Gordon*, 394 U.S. 759, 767, 89 S. Ct. 1426, 1430 (1969) (employer must provide candidate unions with names and addresses prior to election of bargaining representative).

*Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *EPA v. Mink*, 410 U.S. 73, 79 (1973). As Chief Justice Rehnquist has explained,

[t]he system of disclosure established by the FOIA is simple in theory. A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b). . . . Nonetheless, the mandate of the FOIA calls for broad disclosure of Government records, and for this reason we have consistently stated that FOIA exemptions are to be narrowly construed.

*Department of Justice v. Julian*, 486 U.S. 1, 8, 108 S. Ct. 1606, 1611 (1988) (citations and internal quotation marks omitted).

In light of all of these considerations, it is not surprising that the FLRA and the courts of appeals all agreed that the FLRS and the FOIA together required the disclosure of employees’ names and addresses. The only surprising thing is that this issue—seemingly so well settled—is once again before the courts of appeals, and that the prior consensus has disappeared.<sup>4</sup> The reason for the resurrection of this

<sup>4</sup> In addition to the case pending before this Court, cases raising the identical issue are pending or have recently been decided in every other Circuit. In its resurrected state the issue has proved far more divisive than it was previously, as it has produced several two to one decisions, as well as a sharp split among the Circuits.

The District of Columbia Circuit was the first to revisit this issue, in *FLRA v. United States Dep’t of the Treasury, Financial Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990). The panel of the D.C. Circuit that decided this issue actually handed down three

issue, and the emerging split among the Circuits, is the argument of the federal employers that a recent decision of the Supreme Court alters the balance of public and private interests, such that disclosure of employees' names and address is now forbidden.

opinions. Judge Williams authored the opinion of the Court denying enforcement of the FLRA's order; Judges Sentelle and Ruth Bader Ginsburg each authored concurring opinions.

The First, Second, and Seventh Circuits, following the decision of the D.C. Circuit, have also denied enforcement of the FLRA's order. *FLRA v. United States Department of the Navy*, — F.2d — (7th Cir. 1992); *FLRA v. United States Dep't of Veterans Affairs, Veterans Affairs Medical Center*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. United States Dep't of the Navy, Naval Communications Unit Cutler*, 941 F.2d 49 (1st Cir. 1991). The Sixth Circuit has recently issued a summary opinion adopting the reasoning of the D.C., First, and Second Circuits, denying enforcement of the FLRA's order. *FLRA v. Dep't of the Navy, Naval Resale Activity*, — F.2d — (6th Cir. 1992).

A panel of the Third Circuit initially denied enforcement of the FLRA's order, but that Court decided to rehear the issue en banc, and therefore vacated the panel opinion and withdrew it from the bound volume of the Federal Reporter. See *FLRA v. United States Dep't of the Navy, Navy Ships Parts Control Center*, 944 F.2d 1088 (3d Cir. 1991), vacated and withdrawn. Sitting en banc, the Third Circuit reversed the panel, and has now granted the FLRA's petition for enforcement of its order. *FLRA v. United States Dep't of the Navy, Navy Ships Parts Control Center*, — F.2d — (3d Cir. 1992).

A panel of the Fourth Circuit also granted enforcement of the FLRA's order, but that Court has also decided to rehear the issue en banc, and has therefore vacated the panel opinion. *FLRA v. United States Dep't of Commerce, NOAA*, 954 F.2d 994 (4th Cir. 1992), vacated; petition for rehearing granted (4th Cir. April 22, 1992).

A panel of the Ninth Circuit has also granted enforcement of the FLRA's order. *FLRA v. United States Dep't of the*

### C. The Supreme Court's Decision in Reporters' Committee

In *Department of Justice v. Reporters' Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989), a CBS news correspondent requested the Federal Bureau of Investigation to disclose, pursuant to the Freedom of Information Act, information concerning the criminal records of four members of the Medico family of Philadelphia, a family suspected of ties to organized crime. The FBI complied with the request as to three of the Medicos, each of whom was deceased, but refused the request relating to the fourth Medico. The correspondent brought an action to compel disclosure of the information. The Supreme Court held that the FBI was not required to release the information sought.

The Court reaffirmed that the FOIA's "basic policy [is one] of full agency disclosure unless information is exempted under clearly delineated statutory language." 109 S. Ct. at 1481 (citations and internal quotation marks omitted). This basic policy, the Court explained, "focuses on the citizens' right to be informed about 'what their government is up to.'" *Id.* That is, "the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed." *Id.* at 1482. "Thus," the Court held,

*Navy, Navy Resale & Services Support Office*, 958 F.2d 1490 (9th Cir. 1992). A petition for rehearing en banc is currently pending before that Court.

Finally, similar cases are currently pending before the Eighth, Tenth, and Eleventh Circuits.

whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested.

*Id.* at 1481. Because release of criminal history information about the *Medico* family would not open any Government activities to the sharp eye of public scrutiny, release of that information would not serve the type of interest protected by the FOIA. Accordingly, in conducting the balancing required by the FOIA's exemption 7(C), the *Medico*'s privacy interest necessarily outweighed the (non-existent, or at least non-cognizable) disclosure interest.

#### D. *Balancing Public and Private Interests After Reporters' Committee*

The employer federal agencies now argue, and the dissent agrees, that the Supreme Court's opinion in *Reporters' Committee* alters the balance of public and private interests by eliminating from consideration the public interest—embodied in the FLRS—in collective bargaining. That is, because disclosure of the employees' names and addresses advances the public interest served by the FLRS—protection and promotion of collective bargaining—but does not advance the public interest served by the FOIA—opening agency action to the light of public scrutiny—disclosure of the employees' names and addresses is no longer permissible. The agencies and the dissent have read too much into *Reporters' Committee*.

Initially, of course, it must be acknowledged that if one applies the restrictions announced in *Reporters' Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited in this case. Release of the employees' names and addresses would not in any meaningful way open agency action to the light of public scrutiny; the only good reason to disclose those names and addresses is to allow the unions to fulfill their statutory mandate to represent the employees in their bargaining units. Thus, if letting the public know what the government is up to is the only interest that may be considered in favor of disclosure, then the employees' privacy interests, however limited they may be, would nonetheless prevail, and would prohibit disclosure.

However, *Reporters' Committee* does not control the outcome of this case. This is so for two reasons. First, the exemption addressed by *Reporters' Committee* is not the same exemption at issue in this case. *Reporters' Committee* determined the scope of Exemption 7(C) while we construe Exemption 6. While the language in these two exemptions is somewhat similar, the Supreme Court pointed out that there are significant enough differences between them that Exemption 7(C) should be applied more broadly than Exemption 6. *Reporters' Committee*, 109 S. Ct. at 1473. The Court first recognized that while Exemption 6 mandates that the invasion of privacy be "clearly unwarranted," Exemption 7(C) requires that the invasion of privacy be merely "unwarranted." The Court then observed that while Exemption 6 applies to disclosures which "would constitute" an invasion of privacy, Exemption 7(C) pertains to disclosures which

"could reasonably be expected to constitute" such an invasion. Because of these differences, the Supreme Court determined that "the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law-enforcement purposes [under Exemption 7(C)] is somewhat broader than the standard applicable to personnel, medical, and similar files [under Exemption 6]." *Id.* at 1473.

Second, unlike the complainants in *Reporters' Committee*, the unions' disclosure requests in this case do not arise under the FOIA. They are not FOIA requests. Rather, their requests originate from within the FLRS and its Congressionally endorsed framework for protecting and promoting collective bargaining. As a result, *Reporters' Committee* is not controlling because "[t]hat case did not present an occasion to evaluate the [FLRS's] explicit policy favoring collective bargaining as in the public interest, nor the interrelated rights and responsibilities imposed by Congress on an exclusive bargaining representative." *FLRA v. United States Der't of the Navy, Navy Ships Parts Control Center*, [Nos. 90-3690 & 90-3724, slip op. at 23 (3d Cir. May 26, 1992)]—F.2d —, — (3d Cir. 1992) (en banc). In sum, *Reporters' Committee* has absolutely nothing to say about the FLRS, or the situation that arises when disclosure is initially required by some statute other than the FOIA, and the FOIA is employed only secondarily.

Moreover, even the courts that have denied enforcement of the FLRA's orders have recognized that *Reporters' Committee* does not specifically address the issues raised by this case. The rule announced in *Reporters' Committee* that "the identity of the requesting

party has no bearing on the merits of his or her FOIA request,"

does not necessarily mean that there is no exception to the general rule that the public interest in disclosure under FOIA should be defined exclusively in terms of finding out what the "government is up to." Nothing in the [rule announced by *Reporters' Committee*] suggests that the Court had considered and rejected the relevance of public interest objectives identified by Congress in other disclosure statutes. Moreover, the argument here is not that the *identity* of the requester should alter the disclosure interest, but rather that a congressional (non-FOIA) disclosure mandate might do so.

*Dep't of Treasury, Financial Management Service*, 884 F.2d at 1453.

The agencies argue, however, that the "plain language" of the FLRS, the Privacy Act, and the FOIA do not allow for any variations from the norms announced in *Reporters' Committee*. They suggest that in restricting its reach to disclosures not otherwise prohibited by law" the FLRS incorporates unmodified the Privacy Act and the FOIA, and the restrictions that apply to FOIA requests. Thus, they contend, it would require an "imaginative reconstruction" of the Privacy Act and the FOIA to be able to introduce collective bargaining values into the balancing process.

The obvious flaw in the agencies' position, of course, is that prior to the decision in *Reporters' Committee*, every court that read the "plain language" of the FLRS, the Privacy Act, and the FOIA

concluded that that language required the disclosure of employees' names and addresses. Whatever else *Reporters' Committee* may have done, it certainly did not amend the language of the FLRS, the Privacy Act, or the FOIA. Thus, it can hardly be said that the "plain language" of those statutes forbids disclosure, or that to bring into consideration the strong public interest in collective bargaining would require any imaginative reconstruction of those statutes. All that is required is the recognition that *Reporters' Committee* does not speak to the situation that arises when the Privacy Act and the FOIA are incorporated into some other statutory scheme which contemplates disclosure of agency records for purposes other than opening agency action to the light of public scrutiny.

Put differently—and wholly apart from the "plainness" of Congress' language—it certainly cannot be the case that Congress intended to have it both ways. That is, it is not plausible to suggest both 1) that Congress intended for names and addresses of employees to be disclosed, and 2) that Congress intended that the names and addresses of employees not be disclosed. It must be one or the other. Previously, as noted above, every court to consider the question had held that the correct position was that disclosure was required, a position which presumably gave effect to Congress' intention, as expressed in the FLRS and its incorporation of the Privacy Act and the FOIA. As with the language of the statutes, whatever else *Reporters' Committee* may have done, it certainly did not alter the Congressional intent embodied in these statutes. Thus, there simply is no merit in the agencies' suggestion that by drafting the FLRS as it did, Congress intended to prohibit disclosure of the names and addresses of employees.

It therefore becomes apparent that the agencies' position is not at all as "plain" as they suggest. They do not argue that the language of the FLRS plainly prohibits disclosure, but rather that the language of the FLRS has somehow *become* "plain" in the light of *Reporters' Committee*—such that it now "plainly" prohibits disclosure—despite the fact that *Reporters' Committee* has nothing at all to say about FLRS. Again, whatever may be urged with respect to the effect of *Reporters' Committee*, that decision certainly does not mean—indeed, it does not anywhere suggest—that the strong public interest in collective bargaining no longer exists, or that that interest has diminished in value. At most, *Reporters' Committee* forbids the federal courts to take that interest into account when striking the balance between public and private interests.

We do not think, however, that *Reporters' Committee* goes even that far. Rather, we think it clear that the Supreme Court's opinion in *Reporters' Committee* is limited to the situation that arises when disclosure is sought under the FOIA alone, such that only the interests served by the FOIA may be included in the balancing. *Reporters' Committee* simply does not apply when disclosure is commanded by some statute other than the FOIA, a statute which borrows the FOIA's disclosure calculus for another purpose. When, as here, disclosure is sought through the FOIA only because the FOIA has been incorporated into another statute as a mechanism for disclosure of information, it is entirely proper and necessary—if all of Congress' aims are to be achieved—to weigh into the balance the interests recognized by the statute which generates the request for information. *See, e.g., Dep't of the Navy, Navy Resale &*

*Services Support Office*, 958 F.2d at 1496 ("We doubt that Congress intended that its statement of the public interest in section 7101(a)(1) [of the FLRS] be ignored when examining the public interest element incorporated into section 7114(b)(4) through [the] FOIA.").

Indeed, it would require a particularly convoluted line of reasoning to conclude that the Congress, while 1) expressly recognizing the great public interest in collective bargaining, 2) acting to protect that interest, and 3) providing for disclosure of information according to a "formula which encompasses, balances, and protects all interests," would nevertheless forbid the federal courts to consider the public interest in collective bargaining when balancing the interests favoring and opposing disclosure of information which is conceded to be necessary to the full and proper conduct of collective bargaining.<sup>5</sup>

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<sup>5</sup> Our holding should alleviate one other concern raised by the agencies. As they correctly point out, *Reporters' Committee* held that the identity of the person requesting disclosure under the FOIA makes no difference in the balancing of interests. 109 S. Ct. at 1480. The agencies go on to argue that if they are required to disclose the names and addresses of their employees to the unions involved here, that they will therefore be required to disclose those names and addresses to anyone, including persons who may use the names and addresses to annoy or harass the employees with unwanted mail solicitations or other intrusions into the employees' privacy.

There are three flaws in the agencies' attempt to cause alarm. First, there is no evidence in the record before us that suggests that the agencies' concern is valid or at all serious. Indeed, there is no suggestion at all in the record that in the past, when disclosure was uniformly required, that any great evils flowed from that disclosure. Second, if there are indi-

In sum, we hold that *Reporters' Committee* does not require the federal courts, when balancing interests favoring and opposing disclosure, to ignore public interests other than those embodied in the FOIA when the disclosure request originates from some statute other than the FOIA. In such a case, it is proper for the federal court to consider the public

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vidual employees who have particular or specially heightened concerns about their safety or privacy, they may individually request that their names and home addresses not be released. The Eighth Circuit has previously authorized such a procedure, and it provides a workable procedure for those unusual cases in which an employee's privacy interest is more substantial than the norm. *See, e.g., United States Dep't of Agriculture v. FLRA*, 836 F.2d 1139, 1144 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 831 (1989). Similarly, if there is a class of employees who have particular or specially heightened concerns about their safety or privacy, it may be such concerns alter the balancing of public and private interests.

Third, the agencies have undoubtedly overstated the degree to which disclosure of the names and addresses to the unions would require disclosure to other entities. The agencies have confused the *identity* of the person requesting information with the *interest* of the person requesting information. *Reporters' Committee* clearly prohibits distinguishing among requests solely on the basis of the identity of the person making the request. What *Reporters' Committee* does not speak to is distinguishing among requesters on the basis of the interests they assert. That is, when disclosure is sought (and ordered) under some statute other than the FOIA, then only someone who can invoke that statute will be entitled to that disclosure. In this case, for instance, the FLRS authorizes disclosure only to labor organizations. A direct mail merchandiser does not occupy the same position, and therefore would not have an equal claim to disclosure. *See Dep't of the Navy, Navy Ships Parts Control Center*, — F.2d at — (slip op. at 27); *Dep't of the Navy, Navy Resale & Services Support Office*, 958 F.2d at 1495.

interests embodied in the statute which generates the disclosure request. This approach fully accords not only with the FLRS—with its explicit declaration that it seeks to promote collective bargaining and its direction to unions that they represent non-member employees as faithfully as they do their members—but also fully accords with Congress' aim in establishing the FOIA—to provide a workable formula “which encompasses, balances, and protects all interests.” Indeed, we can see no basis on which to hold that although Congress expressly recognized the value to the nation of collective bargaining, it intended to exclude consideration of that value from the decision to disclose or not to disclose to labor unions the names and addresses of public sector employees.<sup>6</sup>

### III. Conclusion

For the reasons stated, this Court holds that the public interest in collective bargaining outweighs the employees' private interests in the nondisclosure of their names and addresses. Accordingly, disclosure of the employees' names and addresses would not constitute a clearly unwarranted invasion of privacy, and is not prohibited by the Privacy Act. The FLRA's application for enforcement of its orders compelling disclosure of the names and addresses is GRANTED. The agencies' cross-petitions for review of those orders are DENIED.

### ENFORCEMENT GRANTED.

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<sup>6</sup> Because we hold that disclosure of the employees' names and home addresses is proper under the FOIA exception to the Privacy Act, we need not address the parties' arguments concerning disclosure of that information under the “routine use” exception to the Privacy Act, 5 U.S.C. § 552a(b)(3).

### EMILIO M. GARZA, Circuit Judge, dissenting:

Because application of *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d. 774 (1989) to this case bars disclosure of the names and addresses of public sector employees, I respectfully dissent.<sup>1</sup>

The majority holds that “*Reporters Committee* does not require the federal courts, when balancing interests favoring and opposing disclosure, to ignore public interests other than those embodied in the FOIA when the disclosure request originates from some other statute other than the FOIA.” Slip op. at 26. I disagree.

The language of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the “FLRS”), provides that a federal agency must furnish to the exclusive representative data “reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects

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<sup>1</sup> See *FLRA v. United States Dep't of the Navy, Navy Exchange*, — F.2d — (7th Cir. 1992); *FLRA v. Dep't of the Navy, Naval Resale Activity*, 963 F.2d 124 (6th Cir. 1992) (adopting the reasoning of the First, Second, and D.C. Circuits on this issue); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. United States Dep't of the Navy, Naval Communications Unit Cutler*, 941 F.2d 49 (1st Cir. 1991); *FLRA v. United States Dep't of Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055, 110 S. Ct. 863, 107 L. Ed. 2d 947 (1990). But see *FLRA v. United States Dep't of the Navy, Navy Ships Parts Control Center*, 966 F.2d 747 (3d Cir. 1992) (en banc); *FLRA v. United States Dep't of the Navy, Navy Resale and Services Support Office*, 958 F.2d 1490 (9th Cir. 1992); *FLRA v. Dep't of Commerce*, 954 F.2d 994 (4th Cir.), vacated and petition for reh'g granted, 966 F.2d 134 (4th Cir. 1992).

within the scope of collective bargaining [to the extent not prohibited by law]." 5 U.S.C. § 7114(b)(4) (B). The D.C., First, Second, Sixth, and Seventh Circuits have held that "[t]he broad cross-reference in 5 U.S.C. § 7114(b)(4)—'to the extent not prohibited by law'—picks up the Privacy Act *unmodified*."<sup>2</sup> *Treasury*, 884 F.2d at 1457 (Ginsburg, J., concurring) (emphasis added). "The Privacy Act, [however], excepts from its prohibition against disclosure information that must be made available under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, 5 U.S.C. § 552a(b)(2) . . ." *Veterans Affairs*, 958 F.2d at 505. "Subsection 552(b)(6) ("exemption 6") of the FOIA, [in turn], exempts from disclosure 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'" *Naval Communications*, 941 F.2d at 52 (quoting 5 U.S.C. § 552(b)(6)).

Once placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public. True, un-

<sup>2</sup> See *Navy Exchange*, — F.2d at — ("[I]t seems to us . . . that the *Labor Act* itself by authorizing disclosure 'not prohibited by law' directs us to the *Privacy Act*, which in turn directs us to *FOIA*."); *Veterans Affairs*, 958 F.2d at 505 ("Concededly the Act affording disclosure 'to the extent not prohibited by law' implicates the prohibitions contained in the *Privacy Act of 1974*, 5 U.S.C. § 552a, which generally bars disclosure of personal information, absent consent of the individual affected."); *Naval Communications*, 941 F.2d at 52 ("There is no dispute but that the employees' addresses sought here fall within the general *Privacy Act* protection of [5 U.S.C.] § 552a(b).").

ions have a special interest in identifying and communicating with persons in the bargaining unit, an interest initially accommodated by 5 U.S.C. § 7114(b)(4). The bargaining process facilitation interest is ultimately unavailing, however, because it 'falls outside the ambit of the public interest that the FOIA was enacted to serve,' *i.e.*, the interest in advancing 'public understanding of the operation or activities of the government.' *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, — U.S. —, 109 S. Ct. 1458, 1482-83, 103 L. Ed. 2d 774 (1989).

*Treasury*, 884 F.2d at 1457 (Ginsburg, J., concurring).<sup>3</sup>

Nonetheless, the majority argues that "*Reporters Committee* does not control the outcome of this case" because "*Reporters Committee* determined the scope of Exemption 7(C) while we construe Exemption 6." Slip op. at 20. While I agree that *Reporters Committee* deals with Exemption 7(C) and not Exemp-

<sup>3</sup> See *Navy Exchange*, — F.2d at — ("What *Reporters Committee* adds to this analysis is that the *only* public interest cognizable under FOIA is the interest of the citizenry in obtaining information about the activities of its government."); *Veterans Affairs*, 958 F.2d at 512 ("[W]hether FOIA authorizes disclosure requires consideration—once a privacy interest is implicated—of only those policy goals and values it is designed to foster. Nowhere in the [FLRS] does its language indicate that disclosure calculus required by FOIA should be modified."); *Naval Communications*, 941 F.2d at 54 ("We agree with the D.C. Circuit that, in light of *Reporters Committee*, disclosure of the addresses to the unions is prohibited by the *Privacy Act*, as it [does not come] within the FOIA . . .").

tion (6), I disagree that *Reporters Committee* determines *only* the scope of Exemption 7(C). The difference between Exemption 6 and 7(C) goes *only* to the degree of personal privacy needed to outweigh the public interest; the public interest factor remains the same under both exemptions.

Although the context in *Reporters Committee* was the special privacy exemption for law enforcement records, exemption 7(C), we see no reason why the *character* of the disclosure interest should be different under exemption 6. While exemption 6 precludes only "a *clearly* unwarranted invasion of personal privacy" (emphasis added), that difference between it and exemption 7(C) goes only to the *weight* of the privacy interest needed to outweigh disclosure.<sup>4</sup>

*Treasury*, 884 F.2d at 1451-52; *see Reporters Committee*, 489 U.S. at 767, 109 S. Ct. at 1479 ("Although the opinion dealt with Exemption 6's exception for 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,' and our opinion today deals with Exemption 7(C), much of our discussion in *Rose* is applicable here.").<sup>5</sup> "What

<sup>4</sup> See *infra* note 6.

<sup>5</sup> See also *United States Dep't of State v. Ray*, \_\_\_\_ U.S. \_\_\_, 112 S. Ct. 541, 549, 116 L. Ed. 2d 526 (1991) (Holding in Exemption (6) case that "[a]s we have repeatedly recognized, FOIA's 'basic policy of "full agency disclosure unless information is exempted under clearly delineated statutory language,' . . . focuses on the citizens' rights to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." (quoting

*Reporters Committee* adds to this analysis is that the *only* public interest cognizable under FOIA is the interest of the citizenry in obtaining information about

*Department of Justice v. Reporters Committee*, 489 U.S. at 773, S. Ct. at 1481 (quoting *Department of Air Force v. Rose*, 425 U.S. at 360-61, 96 S. Ct. at 1598-99)); *Navy Exchange*, \_\_\_\_ F.2d at \_\_\_\_ n.2 ("Although *Reporters Committee* involved FOIA Exemption 7, its definition of the public interest in disclosure in FOIA cases is binding on us here, even though this dispute arises under FOIA Exemption 6."); *Navy Resale*, 958 F.2d at 1493 n.2 (noting that *Reporters Committee* was an Exemption 7(C) case, but explaining that "*Reporters Committee* relied on the leading Exemption 6 case, *Department of Air Force v. Rose*, 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)"); *Veterans Affairs*, 958 F.2d at 508 ("We do not regard such statements as "in conflict with the Supreme Court's teaching in *Rose* [Exemption (6) case] and *Reporters Committee* [Exemption 7(C) case] that whether disclosure of a document is permitted under the FOIA, despite intrusions on privacy interests, is to be assessed solely in terms of 'the nature of the requested document and its relationship to the 'basic purpose of the FOIA to open agency action to the light of public scrutiny.''" (quoting *Reporters Committee*, 489 U.S. at 772, 109 S. Ct. at 1481 (quoting *Rose*, 425 U.S. at 372, 96 S. Ct. at 1604))); *Navy Ships*, 966 F.2d at 754-55 ("The Court [in *Reporters Committee*] also relied upon an Exemption 6 case, *United States Dep't of the Air Force v. Rose*, 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976), to analyze the privacy interests in a rap sheet."); *Naval Communications Unit*, 941 F.2d at 56 ("The Supreme Court noted in *Reporters Committee* that the privacy language is broader under exemption 7(C) than under exemption 6. Nevertheless, apart from the degree of privacy protection, the Supreme Court clearly stated that the public interest in disclosure does not turn on the purposes for which the request was made or on the identity of the party requesting the information, but rather . . . [on] 'open[ing] agency action to the light of public scrutiny.''" (citation omitted) (quoting *Reporters Committee*, 489 U.S. at 772-73, 109 S. Ct. at 1481)).

the activities of its government." *Navy Exchange*, \_\_\_\_ F.2d at \_\_\_\_.

The majority—like the Third Circuit, sitting en banc, and panels of the Fourth and Ninth Circuits—also attempts to distinguish *Reporters Committee* by pointing out that “‘[t]hat case did not present an occasion to evaluate the [FLRS’s] explicit policy favoring collective bargaining as in the public interest, nor the interrelated rights and responsibilities imposed by Congress on an exclusive bargaining representative.’”<sup>6</sup> See slip op. at 21 (alterations in original) (quoting *Navy Ships*, 966 F.2d at 757).

Although I agree that *Reporters Committee* did not consider “the [FLRS’s] explicit policy favoring collective bargaining as in the public interest,” slip op. at 21, the language of section 7114(b)(4) and *Reporters Committee* makes this policy irrelevant. First, “[t]he broad cross-reference in 5 U.S.C. § 7114 (b)(4)—‘to the extent not prohibited by law’—picks up the Privacy Act unmodified.” *Treasury*, 884 F.2d at 1457 (Ginsburg, Jr., concurring). “Nowhere in the [FLRS] does its language indicate that the disclosure calculus required by FOIA should be modified.” *Veterans Affairs*, 958 F.2d at 512.

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<sup>6</sup> See *Navy Resale*, 958 F.2d at 1496 (“‘Nothing in [Reporters Committee] suggests that the Court had considered and rejected the relevance of public interest objectives identified by Congress in other disclosure statutes.’” (alteration in original) (quoting *Treasury*, 884 F.2d at 1453)); *Commerce*, 954 F.2d at 997 (“[In *Reporters Committee*], the Supreme Court considered a request for information made solely under the FOIA. No other federal statute was directly involved. Here, the Union requested the information under section 7114(b)(4)(B) of the FS Labor Statute, which directs the litigants to the Privacy Act which, in turn, directs them to the FOIA. We find this distinction critical . . .”).

Second, *Reporters Committee*—in discussing “what [public interest] factors might warrant an invasion of [personal privacy],” *Reporters Committee*, 489 U.S. at 771, 109 S. Ct. at 1480—excluded from this consideration not only the identity of the requesting party, *see* slip op. at 21-22, 25 n.5, but also its purpose. See *Reporters Committee*, 489 U.S. at 711, 109 S. Ct. at 1480.

Our previous decisions establish that whether an invasion of privacy is *warranted* cannot turn on the *purposes* for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request. Thus, although the subject of a presentence report can waive a privilege that might defeat a third party’s access to that report, and although the FBI’s policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public, the right of two press respondents in this case are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer.

*Id.* (citations omitted) (emphasis added). The public interest standard must be measured by “the core purpose of the FOIA as ‘contribut[ing] significantly to the public understanding of the operations or activities of the government.’” *Id.* at 775, 109 S. Ct. at 1483 (alteration in original).

Because *Reporters Committee* controls "what [public interest] factors might warrant an invasion of [personal privacy]" under FOIA, it also controls disclosure of information requested under the FLRS.<sup>7</sup> Accordingly, I would deny the FLRA's application for enforcement of its orders and grant the agencies' cross-petitions for review.

APPENDIX B  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 90-4722 & 90-4775

FEDERAL LABOR RELATIONS AUTHORITY,  
PETITIONER-CROSS-RESPONDENT,

*versus*

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT  
OF THE NAVY, NAVY CBC EXCHANGE, CONSTRUC-  
TION BATTALION CENTER, GULFPORT, MISSISSIPPI,  
RESPONDENTS-CROSS-PETITIONERS

Applications for Enforcement of an Order of the  
Federal Labor Relations Authority

ON PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING EN BANC

[Filed December 7, 1992]

Before KING, JOHNSON and EMILIO M. GARZA,  
Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of

<sup>7</sup> The majority concedes, "if [under a *Reporters Committee* analysis] letting the public know what the government is up to is the only interest that may be considered in favor of disclosure, then the employees' privacy interests, however limited they may be, would nonetheless prevail, and would prohibit disclosure." Slip op. at 20.

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam D. Johnson  
United States Circuit Judge  
12-2-92

**APPENDIX C**

37 FLRA No. 49

**FEDERAL LABOR RELATIONS AUTHORITY  
WASHINGTON, D.C.**

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**U.S. DEPARTMENT OF THE NAVY  
WASHINGTON, D.C.**

**AND  
NAVY CBC EXCHANGE  
CONSTRUCTION BATTALION CENTER  
GULFPORT, MISSISSIPPI  
(RESPONDENTS)**

and

**UNITED FOOD AND COMMERCIAL WORKERS UNION  
LOCAL 1657  
(CHARGING PARTY)**

4-CA-90054

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**DECISION AND ORDER**

September 27, 1990

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Before Chairman McKee and Members Talkin and Armendariz.

***I. Statement of the Case***

The Administrative Law Judge issued the attached decision in the above-entitled proceeding, finding that the U.S. Department of Defense, U.S. Department of

the Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi (Respondent Activity) had engaged in the unfair labor practices alleged in the complaint by refusing to furnish, upon request of the Union, the names and home addresses of bargaining unit employees. The Judge also found that the U.S. Department of Defense, U.S. Department of the Navy, Washington, D.C. (Respondent Agency) did not instruct the Respondent Activity to refuse the Union's request for names and home addresses. Therefore, the Judge recommended that the complaint against the Respondent Agency be dismissed.

The Judge granted the General Counsel's motion for summary judgment against Respondent Activity and recommended that it be ordered to take appropriate remedial action. The Respondent Activity filed exceptions to the Judge's Decision and the General Counsel filed an opposition to the exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), we have reviewed the rulings of the Judge and find that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, we adopt the Judge's findings, conclusions and recommended Order for the reasons fully set forth in *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 FLRA No. 39 (1990).

## II. Order

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute,

the U.S. Department of Defense, U.S. Department of the Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi, shall:

### 1. Cease and desist from:

(a) Refusing to furnish, upon request of the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama, the exclusive representatives of certain of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

### 2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Furnish the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama, the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) Post at its facilities where bargaining unit employees represented by the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the U.S. Department of Defense, U.S. Department of the Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi and shall be posted in conspicuous places, including all bulletin boards and other places where notices to employees

are customarily posted, and shall be maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

The allegations in the complaint against the U.S. Department of Defense, U.S. Department of the Navy, Washington, D.C. are dismissed.

NOTICE TO ALL EMPLOYEES  
AS ORDERED BY THE FEDERAL LABOR  
RELATIONS AUTHORITY AND TO  
EFFECTUATE THE POLICIES OF THE  
FEDERAL SERVICE LABOR-MANAGEMENT  
RELATIONS STATUTE WE NOTIFY OUR  
EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama, the exclusive representative of certain of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama, the exclusive representative of certain of our employees, the names and home addresses of all employees in the bargaining unit it represents.

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(Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IV, Federal Labor Relations Authority, whose address is: 1371 Peachtree Street, N.E., Suite 736, Atlanta, Georgia 30367 and whose telephone number is: (404) 347-2324.

**APPENDIX D**

UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY  
OFFICE OF ADMINISTRATIVE LAW JUDGE  
WASHINGTON, D.C. 20424

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Case No. 4-CA-90054

DEPARTMENT OF DEFENSE, DEPARTMENT OF THE  
NAVY, WASHINGTON, D.C., AND DEPARTMENT OF  
DEFENSE, DEPARTMENT OF THE NAVY, NAVY CBC  
EXCHANGE, CONSTRUCTION BATTALION CENTER,  
GULFPORT, MISSISSIPPI, RESPONDENTS

and

UNITED FOOD AND COMMERCIAL WORKERS UNION,  
LOCAL 1657 AFL-CIO, CLC, BIRMINGHAM, ALABAMA,  
CHARGING PARTY

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ROBERT R. GIACALONE, Esquire, For the Respondent

LINDA J. NORWOOD, Esquire, For the General Counsel

Before: JESSE ETELSON, Administrative Law Judge

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**DECISION***Statement of the Case*

The unfair labor practice complaint alleges, in substance, that Respondents violated section 7116

(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by refusing to provide the Charging Party (Union), the agent of the exclusive representative of certain of Respondents' employees, with the names and home addresses of bargaining unit employees represented by the Union.

On or about March 8, 1989, Counsel for the General Counsel moved for summary judgment against Respondent Navy CSC Exchange. The Regional Director transferred the motion to the Chief Administrative Law Judge, pursuant to section 2423.22 (b)(1) of the Regulations, and it was assigned to the undersigned for disposition pursuant to section 2423.19(k) and section 2423.22(b)(3) of the Regulations. Respondents served their opposition on March 13, 1989, requesting that judgment be granted in their favor.

Based upon the entire record, and it appearing that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law, I make the following findings of fact, conclusions of law, and recommendation.

#### *Findings of Fact*

The United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama, (the Union) is the exclusive representative of certain employees at Respondents' Gulfport Navy CBC Exchange, Gulfport, Mississippi. On or about August 11, 1988, the Union requested that an agent of Respondents provide it with the names and home addresses of all bargaining unit employees represented by the Union. On or about October 19, 1988,

and at all times since, Respondent Exchange has refused to furnish the Union with the requested information.

#### *Discussion, Conclusions, and Recommendations*

The names and mailing addresses of bargaining unit employees are normally maintained by Respondents in the regular course of business, are reasonably available, are necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, and do not constitute guidance, advice, counsel, or training for management officials or supervisors relating to collective bargaining.<sup>1</sup>

The decision in this case is controlled by the Authority's decision in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA 788 (1986) (*Farmers Home*), enforced in part and remanded sub nom. *U.S. Department of Agriculture and Farmers Home Administration Finance Office, St. Louis, Missouri v. FLRA*, 836 F.2d 1139 (8th Cir. 1988). In *Farmers Home* the Authority held that "the statutory requirement concerning sufficiency of a request under section 7114(b)(4) is satisfied for requests such as that involved here [for names and addresses] when a general written request for the information is made. A precise explanation of the reasons for the request involved here is not necessary." The Authority also emphasized that

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<sup>1</sup> While the Respondents' answer denies all of these elements with respect to the requested data, it is clear from its opposition papers that it contests only the "necessary" element and contends that a material factual issue exists as to the Union's alternative means of communicating with unit employees.

names and addresses of bargaining unit employees should be provided whether or not alternative means of communication are available. The Authority stated, "We will not review the adequacy of alternative methods of communication on a case-by-case basis."

In *Farmers Home*, the Authority gave full consideration to the many issues raised by requiring disclosure of names and addresses of federal employees. The Authority analyzed the interplay of the Statute, the Privacy Act, and the Freedom of Information Act, and concluded that, "the release of names and home addresses to the Union is not prohibited by law, is necessary for the Union to fulfill its duties under the Statute, and meets the other requirements of section 7114(b)(4)." The Authority's decision in *Farmers Home* analyzed the two exceptions to the Privacy Act's bar to disclosure of personal information pertinent to the release of employees' names and home addresses: exception (b)(2), concerning the Freedom of Information Act, and exception (b)(3), relating to "routine use" of information. The Authority found that both exceptions to the Privacy Act's bar applied so as to authorize release of the information under the Privacy Act.

To the extent that the Eighth Circuit enforced the Authority's order, there is, needless to say, no point in my entertaining arguments to the contrary.<sup>2</sup> To

<sup>2</sup> On January 13, 1989, the Supreme Court vacated the judgment of the Eighth Circuit and remanded the case to that court for further consideration in light of the respondent agency's recent "routine use" regulations. 57 U.S.L.W. 3470, 130 LRRM 2272. That disposition does not affect the controlling weight, before me, of the Authority's decision in *Farmers Home*.

the extent that the Eighth Circuit limited enforcement of the Authority's order—by requiring disclosure of the names and addresses of only those employees who do not request their employers to keep the information confidential—the Authority has now spoken in response to that limitation. The Authority has rejected an employing activity's request that it adopt the Eighth Circuit's limitation, and has ordered the activity to provide the information as requested. *Department of the Navy, Naval Plant Representative Office, Sikorsky Aircraft (Stratford, CT)*, 32 FLRA 675 (1988).

Consistent with the Authority's decision in *Farmers Home*, Respondents were required to furnish the Union with the names and addresses of the employees in the bargaining unit it represents. Their refusal to do so violated section 7116(a)(1), (5) and (8) of the Statute. See also *United States Department of the Navy and Philadelphia Naval Shipyard v. FLRA*, 840 F.2d 1131 (3rd Cir. 1988), enforcing *Philadelphia Naval Shipyard*, 24 FLRA 37 (1986); *U.S. Department of the Air Force, Scott Air Force Base, Illinois v. FLRA*, 838 F.2d 229 (7th Cir. 1988), affirming *Department of the Air Force, Scott Air Force Base, Illinois*, 24 FLRA 226 (1986); *Department of Health and Human Services, Social Security Administration v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), affirming *Department of Health and Human Services, Social Security Administration*, 24 FLRA 543 (1986); *Veterans Administration, Washington, D.C. and Dallas Veterans Administration Medical Center, Dallas, Texas*, 31 FLRA 740 (1988).

As the motion for summary judgment is directed only against Respondent Exchange, and as the motion papers accept the Respondents' denial that Respond-

ent Exchange acted upon orders or instructions from Respondent Navy and also note that the collective bargaining relationship is at the local (Exchange) level, I shall recommend that the allegations in the complaint against Respondent Navy be dismissed. *See U.S. Department of Defense, U.S. Department of the Navy, Washington, D.C.*, 28 FLRA 859 (1987).

Based on the foregoing, the General Counsel's motion for summary judgment against Respondent Exchange is granted. It is recommended that the Authority issue the following:

#### ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Labor-Management Relations Statute, the Department of Defense, Department of the Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi, shall:

##### 1. Cease and desist from:

(a) Refusing to furnish, upon request of the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama, the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

##### 2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Furnish the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC,

Birmingham, Alabama, with the names and home addresses of all employees in the bargaining unit it represents.

(b) Post at its facilities where bargaining unit employees represented by the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Department of Defense, Department of the Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the portion of the Complaint alleging unfair labor practices by Respondent Department of Defense, Department of the Navy, Washington, D.C., is dismissed.

Issued, Washington, D.C., April 26, 1989.

/s/ Jesse Etelson  
JESSE ETELSON  
Administrative Law Judge

NOTICE TO ALL EMPLOYEES  
PURSUANT TO  
A DECISION AND ORDER OF THE  
FEDERAL LABOR RELATIONS AUTHORITY  
AND IN ORDER TO EFFECTUATE THE  
POLICIES OF CHAPTER 71 OF TITLE 5 OF THE  
UNITED STATES CODE  
FEDERAL SERVICE LABOR-MANAGEMENT  
RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama, the exclusive representative of certain of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the United Food and Commercial Workers Union, Local 1657, AFL-CIO, CLC, Birmingham, Alabama, with the names and home addresses of all employees in the bargaining unit it represents.

---

(Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: 1371 Peachtree Street, N.E., Suite 736, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.

37 FLRA No. 78

## APPENDIX E

FEDERAL LABOR RELATIONS AUTHORITY  
WASHINGTON, D.C.

U.S. DEPARTMENT OF DEFENSE  
ARMY AND AIR FORCE EXCHANGE SERVICE  
DALLAS, TEXAS  
(RESPONDENT)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES  
LOCAL 1345  
(CHARGING PARTY)  
7-CA-90172

## DECISION AND ORDER

October 11, 1990

Before Chairman McKee and Members Talkin and Armendariz.

I. *Statement of the Case*

The Administrative Law Judge issued the attached decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint by refusing to furnish, upon request of the Charging Party, the names and home addresses of bargaining unit employees. The Judge granted the General Counsel's motion for sum-

mary judgment and recommended that Respondent be ordered to take appropriate remedial action. The Respondent filed an exception to the Judge's Decision. The General Counsel filed an opposition to the Respondent's exception.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), we have reviewed the rulings of the Judge and find that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision, the exception, and the entire record, we adopt the Judge's findings, conclusions, and recommended Order, as modified,\* for the reasons fully set forth in *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 FLRA No. 39 (1990).

The Union's request for the names and home addresses of unit employees satisfies the requirements of section 7114(b)(4). Therefore, the Respondent was required to provide the data requested by the Union and its refusal to do so violated section 7116 (a)(1), (5) and (8) of the Statute.

II. *Order*

Pursuant to section 2423.29 of the Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute,

\* In his recommended Order the Judge directed that the Notice be signed by "a senior official." Judge's Decision at 3. The Judge's recommended Order has been modified to require that the Notice be signed by an official designated by the Authority rather than one determined by the Respondent. See *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 35 FLRA 1230, 1231-32 (1990).

the Army and Air Force Exchange Service, Dallas, Texas, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 1345, the agent of the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit working at its Lowry Air Force Base, Colorado, facility.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Furnish the American Federation of Government Employees, AFL-CIO, Local 1345, the agent of the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit working at its Lowry Air Force Base, Colorado, facility.

(b) Post at all facilities where bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1345, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Army and Air Force Exchange Service, Dallas, Texas and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other

places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES  
AS ORDERED BY THE  
FEDERAL LABOR RELATIONS AUTHORITY  
AND TO EFFECTUATE THE POLICIES OF THE  
FEDERAL SERVICE LABOR-MANAGEMENT  
RELATIONS STATUTE

## **WE NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT refuse to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 1345, the names and home addresses of all employees in the bargaining unit working at its Lowry Air Force Base, Colorado, facility.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the American Federation of Government Employees, AFL-CIO, Local 1345, the names and home addresses of all employees in the bargaining unit at its Lowry Air Force Base, Colorado, facility.

(Agency)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
- (Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 844-5224.

**APPENDIX F**

UNITED STATES OF AMERICA  
 FEDERAL LABOR RELATIONS AUTHORITY  
 OFFICE OF ADMINISTRATIVE LAW JUDGES  
 WASHINGTON, D.C. 20424

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Case No. 7-CA-90172

ARMY AND AIR FORCE EXCHANGE SERVICE,  
 DALLAS, TEXAS, RESPONDENT

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,  
 AFL-CIO, LOCAL 1345, CHARGING PARTY

---

BRUCE CONANT, Esq., For the General Counsel

JANIS E. BALDIN, Esq., For the Respondent

Before: JESSE ETELSON, Administrative Law  
 Judge

---

**DECISION***Statement of the Case*

The unfair labor practice complaint alleges, in substance, that Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, (the Statute), by refusing to provide the Charging Party (Union), the agent of the exclusive representative of certain of

Respondent's employees, with the names and home addresses of bargaining unit employees represented by the Union.

On or about April 5, 1989, Counsel for the General Counsel moved for summary judgment against Respondent. The Regional Director transferred the motion to the Chief Administrative Law Judge, pursuant to section 2423.22(b)(1) of the Regulations, and it was assigned to the undersigned for disposition pursuant to section 2423.19(k) and section 2423.22(b)(3) of the Regulations. Respondent served its opposition on April 26, 1989, with a cross-motion for summary judgment in its favor, and Counsel for the General Counsel filed an opposition to the Respondent's cross-motion.

Based upon the entire record, and it appearing that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law, I make the following findings of fact, conclusions of law, and recommendation.

*Findings of Fact*

American Federation of Government Employees, AFL-CIO, Local 1345 (the Union) is the agent for the exclusive representative of certain employees at Respondent's facility at Lowry Air Force Base, Colorado. On or about October 13, 1988, the Union requested that the Respondent provide it with the names and home addresses of all bargaining unit employees working at Respondent's Lowry Air Force Base, Colorado, facility. On or about November 3, 1988, and at all times since, the Respondent has refused to furnish the Union with the requested information.

*Discussion, Conclusions, and Recommendations*

The names and home addresses of bargaining unit employees are normally maintained by Respondent in the regular course of business, are reasonably available, are necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, and do not constitute guidance, advice, counsel, or training for management officials or supervisors relating to collective bargaining. Moreover, the release of the names and addresses is not prohibited by law. *Departments of the Army and Air Force, Army and Air Force Exchange Service Headquarters, Dallas, Texas, and Army and Air Force Exchange Service, McClellan Air Force Base, California*, 26 FLRA 691 (1987); *United States Department of Defense, Departments of the Army and Air Force Exchange Service, Dallas, Texas*, 32 FLRA 968 (1988). Both of the cited cases are controlling and establish that, under existing Authority precedent, Respondent violated section 7116 (a)(1), (5), and (8) of the Statute. I therefore recommend that the Authority issue the following order:

**ORDER**

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Army and Air Force Exchange Service, Dallas, Texas, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 1345, the agent of the exclusive

representative of certain of its employees, the names and home addresses of all employees in the bargaining unit working at its Lowry Air Force Base, Colorado, facility.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Furnish the American Federation of Government Employees, AFL-CIO, Local 1345, the agent of the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit working at its Lowry Air Force Base, Colorado, facility.

(b) Post at all facilities where bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 1345, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Army and Air Force Exchange Service, Dallas, Texas and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 7, Federal Labor Relations Author-

ity, 535 - 16th Street, Suite 318, Denver, CO 80202 in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., August 28, 1989

/s/ Jesse Etelson  
 JESSE ETELSON  
 Administrative Law Judge

**NOTICE TO ALL EMPLOYEES  
 AS ORDERED BY THE FEDERAL LABOR  
 RELATIONS AUTHORITY AND TO  
 EFFECTUATE THE POLICIES OF THE  
 FEDERAL SERVICE LABOR-MANAGEMENT  
 RELATIONS STATUTE**

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** refuse to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 1345, the names and home addresses of all employees in the bargaining unit working at its Lowry Air Force Base, Colorado, facility.

**WE WILL NOT** in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

**WE WILL** furnish the American Federation of Government Employees, AFL-CIO, Local 1345, the names and home addresses of all employees in the bargaining unit working at its Lowry Air Force Base, Colorado, facility.

---

(Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
 (Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 7, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 844-5224.

Supreme Court, U.S.  
FILED  
MAR 5 1993  
OFFICE OF THE CLERK

(2)

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF  
NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, AND THE U.S.  
DEPARTMENT OF DEFENSE, ARMY and AIR FORCE EX-  
CHANGE, DALLAS, TEXAS, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN  
FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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MEMORANDUM FOR THE  
FEDERAL LABOR RELATIONS AUTHORITY

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DAVID M. SMITH \*  
*Solicitor*

WILLIAM R. TOBEY  
*Deputy Solicitor*

WILLIAM E. PERSINA  
*Attorney*

PAMELA P. JOHNSON  
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*Washington, D.C. 20424-0001*  
*(202) 482-6620*

\* Counsel of Record

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**In the Supreme Court of the United States**

OCTOBER TERM, 1992

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No. 92-1223

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, AND THE U.S. DEPARTMENT OF DEFENSE, ARMY and AIR FORCE EXCHANGE, DALLAS, TEXAS, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

---

**MEMORANDUM FOR THE  
FEDERAL LABOR RELATIONS AUTHORITY**

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**INTRODUCTION**

On January 21, 1993, U.S. Department of Defense, U.S. Department of Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi ("Navy Exchange"), and the U.S. Department of Defense, Army and Air Force Exchange, Dallas, Texas ("AAFES" or "Lowry AF Base") (jointly referred to as "the agencies"), petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

(1)

The opinion of the court of appeals is reported at 975 F.2d 1105, and is appended to the petition (Pet. App. 1a-34a). The court's denial of the agencies' petition for rehearing and suggestion of rehearing *en banc* is also appended to the petition (Pet. App. 35a-36a).

It is the position of the respondent Federal Labor Relations Authority (Authority) that the Fifth Circuit decision is correct and should be affirmed. However, a division among the circuits exists over the resolution of a major issue in this case concerning the entitlement of exclusive bargaining representatives of federal employees, under 5 U.S.C. 7114(b)(4), to the names and home addresses of employees in the bargaining units represented by the unions. This division causes uncertainty for all participants in federal government labor-management relations. Moreover, resolution of the issue is of considerable importance because it also impacts on the other types of personal information, aside from unit employees' home addresses, that unions will be entitled to in carrying out their representational roles under the Federal Service Labor-Management Relations Statute (Labor Statute), as amended, 5 U.S.C. 7101-7135 (1988). Accordingly, the Authority does not oppose granting the present petition.

## STATEMENT

### A. Background—The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Labor Statute. Under the Labor Statute, the responsibilities of the Federal Labor Relations Authority, a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating

to matters arising under the Labor Statute. 5 U.S.C. 7104-7105.<sup>1</sup>

Congress specified in the Labor Statute that "labor organizations and collective bargaining are in the public interest." 5 U.S.C. 7101(a). Consistent with this finding of Congress, the Labor Statute requires an agency to accord exclusive recognition to a labor organization selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election. 5 U.S.C. 7111(a). A labor organization accorded such exclusive recognition has an obligation to represent fairly "all employees in the unit" regardless of whether they are union members. 5 U.S.C. 7114(a)(1). Employees in a unit of exclusive recognition have the right to refrain from joining a labor organization as a dues-paying member. 5 U.S.C. 7102. The agency and the labor organization have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. 7114(a)(4). The duty to bargain in good faith extends to matters relating to conditions of employment affecting bargaining unit employees. 5 U.S.C. 7103(a)(12) and 7117; *see also Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 644 (1990).

Congress enacted section 7114(b)(4) of the Labor Statute to facilitate union representation and enable unions to meet their representational duties. That section requires a federal employer to furnish the exclusive bargaining representative "to the extent not prohibited by

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<sup>1</sup> The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983) (BATF); *Federal/Postal/Retiree Coalition v. Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

law" with any requested data that is, among other things, "reasonably available"; "normally maintained by the agency in the regular course of business"; and "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." 5 U.S.C. 7114(b)(4).

The Labor Statute also makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Labor Statute]"; "refuse to consult or negotiate in good faith with any labor organization"; or "otherwise fail or refuse to comply with any provision" of the Labor Statute. 5 U.S.C. 7116(a)(1), (5), and (8).

#### B. Proceedings in the Present Case

##### 1. The Authority's Decisions

These cases concern two Authority unfair labor practice decisions and orders. The cases arose from requests by unit employees' exclusive representatives of the agencies under 5 U.S.C. 7114(b)(4) for the employees' names and home addresses (Pet. App. 2a-3a). The facts in both cases are virtually identical. The first case (No. 90-4722 before the Fifth Circuit) involved an information request made by the United Food and Commercial Workers Union, Local 1657, which represents a bargaining unit composed of all regular full-time and part-time employees, and all intermittent employees of the Navy Exchange in Gulfport, Mississippi (Pet. App. 2a). The second case (No. 90-4775 before the Fifth Circuit) involved a request made by the American Federation of Government Employees, Local 1345, the union representing a consolidated, worldwide bargaining unit composed of all regular full-time and part-time employees, and all intermittent employees of AAFES which is headquartered in Dallas, Texas and operates a facility at Lowry AF Base in Colo-

rado (Pet. App. 3a). The Navy Exchange and AAFES, Lowry AF Base denied the unions' requests and the unions filed unfair labor practice charges with the Authority. The Authority ordered the disclosure of unit employee names and home addresses (Pet. App. 37a-51a, 52a-64a).

The Authority based its rulings in both decisions and orders on the Authority's prior decision in *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 F.L.R.A. 515 (1990) (*Portsmouth*), *rev'd sub nom. Department of the Navy, Portsmouth Naval Shipyard, New Hampshire v. FLRA*, 941 F.2d 49 (1st Cir. 1991) (Pet. App. 38a, 53a). In *Portsmouth*, the Authority held that section 7114(b)(4) establishes a broad data disclosure requirement for federal agency employers as part of their bargaining obligation under the Statute. 37 F.L.R.A. at 519. One exception to this requirement, here at issue, is whether disclosure is "prohibited by law." The Privacy Act, 5 U.S.C. 552a (1988), generally bars unconsented disclosure of personal data such as home addresses unless, among other things, release is required under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1988). 5 U.S.C. 552a(b)(2).

Mindful of the fact that the issue of home address disclosure arises under the Labor Statute and thus involves predominantly labor relations concerns, the Authority held in *Portsmouth* that the FOIA exception to the Privacy Act's bar to disclosure applied, and thus home address disclosure to the union under section 7114(b)(4) was not prohibited by law.<sup>2</sup> 37 F.L.R.A. at 524-25, 537. The

<sup>2</sup> In *Portsmouth*, the Authority also reaffirmed its earlier decision on this issue, *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 F.L.R.A. 788 (1986) (*Farmers Hom? Administration*), *enforced in part and remanded sub nom. United States Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated on other grounds and remanded*, 488 U.S. 1025 (1989). 37 F.L.R.A. at 525.

Authority noted particularly the congressionally recognized public interest that underlies section 7114(b) (4), namely, that an effective federal sector collective bargaining system promotes the public interest.<sup>3</sup> 5 U.S.C. 7101(a). 37 F.L.R.A. at 528. The Authority also detailed a number of specific rights and obligations set out in the Labor Statute, such as the duty of fair representation, which disclosure of information to unions under section 7114(b) (4) would facilitate. 37 F.L.R.A. at 527-28.

The Authority in *Portsmouth* respectfully rejected the D.C. Circuit's holding in *FLRA v. Department of the Treasury, Fin. Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990) (*Dep't of the Treasury*), that the Privacy Act barred disclosure. 37 F.L.R.A. at 523. In the Authority's view, *Dep't of the Treasury* was premised on a misapplication of this Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*). 37 F.L.R.A. at 523. The Authority concluded in this connection that *Reporters Committee* should not be applied to disclosure requests arising directly under the Labor Statute, rather than under the FOIA itself. *Id.* The Authority found in *Portsmouth* that direct application of *Reporters Committee* would result in treating federal sector unions like any other member of the public requesting FOIA documents. 37 F.L.R.A. at 526.

## 2. The Court of Appeal's Decision in the Instant Case

The Fifth Circuit enforced the Authority's name and home address disclosure orders and denied the agencies'

<sup>3</sup> The Authority recognized in *Portsmouth*, as it has in other cases under the Labor Statute involving disclosure of personal data, that FOIA Exemption 6 requires balancing the public interest in disclosure against the individual's privacy interest to determine whether the invasion of privacy is "clearly unwarranted." 37 F.L.R.A. at 519.

petitions for review (Pet. App. 1a-34a). Agreeing that employees' names and home addresses are necessary to the full and proper conduct of collective bargaining, the court focused on whether disclosure of those names and home addresses is "prohibited by law" under section 7114 (b) (4) of the Labor Statute (Pet. App. 9a-26a).

In resolving whether disclosure was prohibited by law under the Labor Statute, the court examined the Privacy Act and the FOIA (Pet. App. 10a). The court noted that an exception to the Privacy Act's prohibition against disclosure of personal information about federal employees without their consent was the FOIA (Pet. App. 10a-11a). Generally, the court observed, FOIA "embodies 'a general philosophy of full agency disclosure'" (Pet. App. 11a). However, FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (*id.*). 5 U.S.C. 552(b) (6) (FOIA Exemption 6). The court therefore turned its attention to whether the disclosure in this case would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 6 (*id.*).

The court noted that a consensus had existed among the circuit courts of appeals which had addressed this issue, that unions representing federal employees were entitled to obtain the information under the Labor Statute (Pet. App. 11a-12a).<sup>4</sup> In determining whether disclosure was warranted, these courts weighed the public interest in

<sup>4</sup> *United States Dep't of Agric. v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), vacated on other grounds and remanded, 488 U.S. 1025 (1989); *United States Dep't of the Navy and Philadelphia Naval Shipyard v. FLRA*, 840 F.2d 1131 (3d Cir.), petition for cert. dismissed, 488 U.S. 881 (1988); *United States Dep't of the Air Force v. FLRA*, 838 F.2d 229 (7th Cir.), petition for cert. dismissed, 488 U.S. 880 (1988); *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), petition for cert. dismissed, 488 U.S. 880 (1988); *American Fed'n of Gov't Employees, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986).

promoting collective bargaining by federal employees against the employees' interest in protecting their names and home addresses from disclosure (Pet. App. 12a). Several courts also took notice of the fact that employers in the private sector are required to disclose the same information to employees' exclusive representatives, and found no apparent reason to treat federal union representatives differently (Pet. App. 13a-14a).<sup>5</sup>

The court below also noted that this Court's decision in *Reporters Committee* resulted in a disappearance of the prior consensus among the circuit courts on the disclosure issue (Pet. App. 15a-16a). In *Reporters Committee*, this Court rejected a disclosure request arising directly under FOIA for an FBI "rap sheet" because disclosure would have constituted an unwarranted invasion of personal privacy under FOIA Exemption 7(C) (5 U.S.C. 552 (b) (7) (C) (Exemption 7(C))). The Court determined that the disclosure interest must be measured in terms of its relation to FOIA's basic purpose to open agency action to the light of public scrutiny (Pet. App. 17a-18a). Following *Reporters Committee*, a split developed among the courts of appeals on whether the disclosure of unit employees' home addresses to their exclusive representatives was required under the Labor Statute (Pet. App. 16a).<sup>6</sup>

<sup>5</sup> *United States Dep't of the Navy and Philadelphia Naval Shipyard v. FLRA*, 840 F.2d at 1138; *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d at 1132 n.4; *American Fed'n of Gov't Employees, Local 1760 v. FLRA*, 786 F.2d at 557.

<sup>6</sup> Along with the Fifth Circuit, the following circuit courts of appeals agreed with the Authority that providing employees' home addresses to their exclusive representative under section 7114(b)(4) of the Labor Statute was not prohibited by the Privacy Act. *FLRA v. Department of the Navy, Navy Ships Parts Control Ctr.*, 966 F.2d 747 (3d Cir. 1992) (*en banc*); *FLRA v. Department of the Navy, Navy Resale & Serv. Support Office, Field Support Office, Auburn, Wash.*, 958 F.2d 1490 (9th Cir. 1992) (petition for rehearing and suggestion for rehearing *en banc* pending); and *FLRA v. Department of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l*

The Fifth Circuit found that the courts of appeals which had barred disclosure had "read too much into *Reporters Committee*," and agreed with the circuit courts that held that disclosure was required under the Labor Statute (Pet. App. 18a). The court below gave two reasons. First, the court observed that *Reporters Committee* involved FOIA Exemption 7(C) rather than FOIA Exemption 6. (Pet. App. 19a-20a). In this regard, the court below noted this Court's recognition that Exemption 7(C), which merely requires that an invasion of privacy be "unwarranted," should be applied more broadly than Exemption 6, where the standard is a "clearly unwarranted invasion" of privacy. 489 U.S. at 7.

Second, the court below found "unlike the complainants in *Reporters Committee*, the unions' disclosure requests in this case do not arise under the FOIA" (Pet. App. 20a). Rather, the court indicated, "their requests originate from within the [Labor Statute] and its Congressionally endorsed framework for protecting and promoting collective bargaining" (*id.*). In sum, the court found that *Reporters Committee* "does not require the federal courts, when balancing interests favoring and opposing

*Ocean Serv.*, 954 F.2d 994 (4th Cir. 1992), vacated and reh'g granted (Apr. 22, 1992) (pending before the court *en banc*).

Several other circuits have reversed the Authority on the home address disclosure issue. *FLRA v. United States Dep't of Defense, Army and Air Force Exch. Serv., Dallas, Tex.*, Nos. 90-9561 & 90-9569 (10th Cir. Jan. 20, 1993); *FLRA v. U.S. Dep't of Defense*, 977 F.2d 545 (11th Cir. 1992) (petition for rehearing and suggestion for rehearing *en banc* pending); *FLRA v. Department of the Navy, Navy Exch., Naval Training Station, Naval Hosp., Great Lakes, Ill.*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of the Navy, Naval Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA v. Department of Veterans Affairs Medical Ctr., Newington, Conn.*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 941 F.2d 49 (1st Cir. 1991); *FLRA v. Department of the Treasury, Fin. Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990).

disclosure, to ignore public interests other than those embodied in the FOIA when the disclosure request originates from some statute other than the FOIA" (Pet. App. 25a). In such a case, the court below stated, "it is proper . . . to consider the public interest embodied in the statute which generates the disclosure request" (Pet. App. 25a-26a). This approach, the court indicated, "fully accords not only with the [Labor Statute]—with its explicit declaration that it seeks to promote collective bargaining and its direction to unions that they represent nonmember employees as faithfully as they do their members—but also fully accords with Congress' aim in establishing the FOIA—to provide a workable formula 'which encompasses, balances, and protects all interests'" (Pet. App. 26a). Accordingly, the court ruled that the public interest in collective bargaining outweighed the employees' privacy interests in nondisclosure of their names and home addresses (*id.*). The court concluded that disclosure would not constitute a clearly unwarranted invasion of privacy, and was thus not prohibited by the Privacy Act. The court therefore granted the Authority's enforcement applications requiring disclosure of the information (*id.*).

Judge Emilio M. Garza filed a dissent concluding that *Reporters Committee* controlled the disclosure issue (Pet. App. 27a-34a). Although Judge Garza agreed that *Reporters Committee* did not consider the Labor Statute's "explicit policy favoring collective bargaining as in the public interest," he nevertheless found that the language of section 7114(b)(4) and *Reporters Committee* made the policy irrelevant (Pet. App. 32a). Further, while Judge Garza agreed with the majority that *Reporters Committee* dealt with Exemption 7(C), not Exemption 6, he did not view such differences as determinative here (Pet. App. 29a-31a).

#### THE AUTHORITY DOES NOT OPPOSE THE PETITION

The Authority believes that the decision of the court below is correct. The Authority recognizes, however, that the several courts of appeals that have considered the issue of the disclosure of unit employees' home addresses to their exclusive representatives under the Labor Statute reached varying results.

There is a direct conflict in the courts of appeals on the question of whether unions are prohibited by law, under section 7114(b)(4) of the Labor Statute, from gaining access to unit employees' home addresses. The circuit split is detailed in note 6, *supra*.<sup>7</sup>

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<sup>7</sup> When the Third Circuit *en banc* upheld the Authority, it also examined, among other things, whether home address disclosure was authorized as a "routine use" under the Privacy Act, 5 U.S.C. 552a(b)(3) (Exception (b)(3)). That section authorizes disclosure "for a purpose which is compatible with the purposes for which it was collected," 5 U.S.C. 552a(a)(7), and in accordance with a "routine use" regulation, 5 U.S.C. 552a(e)(4)(D). In the Authority decision before the court, the Authority had concluded that the labor union was a routine user under a routine use statement contained in a regulation promulgated by the Office of Personnel Management (OPM), 49 Fed. Reg. 36,949, 36,956 (1984). The Third Circuit upheld the Authority on that alternative basis. In reaching this conclusion, the Third Circuit refused to defer to OPM's interpretation of its regulation, indicating that "until the OPM publishes its interpretation in a manner sufficient to place the public on notice of both the existence and content of that interpretation, [it would] not defer to the . . . interpretation." 966 F.2d at 764. At the time of the court's *en banc* ruling, OPM had in litigation papers construed its routine use regulation not to provide for the release of home addresses in cases, unless the union had no adequate alternative methods of communication with bargaining unit members.

On September 17, 1992, OPM published Federal Personnel Manual (FPM) Letter 711-164, confirming its previous interpretation of the routine use statement providing, among other things, that unit employees' home addresses are not authorized for release to labor unions in situations where the unions have adequate alternative means of communicating with the employees. Accordingly, in light of OPM's publication, the only dispositive determination remaining

Only this Court can authoritatively rectify this circuit split by speaking to the application of its decision in *Reporters Committee* in the context of disclosure requests arising under the Labor Statute, a statute other than FOIA. The resolution of the issue in this case will determine whether the explicit public interest in collective bargaining embodied in the Labor Statute is relevant to determining the public interest in disclosure of information requested by a federal labor union under provisions of the Labor Statute. See pages 13-14 of the agencies' Petition for Writ of Certiorari. The importance of this issue to federal employees and federal sector labor-management relations makes this a strong basis for granting the petition in this case.

Moreover, this type of circuit conflict raises important issues as to whether Congress intended to create a disparity between the means of communication available to private and federal sector unions. Congress modeled the Authority and the Labor Statute on the National Labor Relations Board and the National Labor Relations Act, 29 U.S.C. 151-169. See *BATF*, 464 U.S. at 92-93. See also *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d at 1132 n.4 (noting that the NLRA, which governs private sector labor relations, shares similar purposes and concerns with the Labor Statute); *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987) ("Congress was fully aware of the analogy between the [Labor Statute] and the National Labor Relations Act . . . . Congress paid

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on the disclosure controversy in the Third Circuit *en banc* decision is the court's resolution of whether the Privacy Act authorizes disclosure of home addresses under FOIA. Eleven judges chose to actively participate in resolving that issue, and a majority of those judges voted in the Authority's favor. Judge Roth abstained from voting on this part of the case. Accordingly, despite the agencies' contentions (Pet. 12 note 6), the operative effect of the *en banc* court decision was a "holding" in the Authority's favor on the FOIA release issue. 966 F.2d at 761.

close attention to judicial precedent in private sector labor law when drafting the [Labor Statute]).

Accordingly, the Authority does not oppose granting the present petition.

Respectfully submitted.<sup>8</sup>

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FEBRUARY 1993

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<sup>8</sup> William C. Bryson, Acting Solicitor General, authorizes the filing of this memorandum.

MAR 9 1993

No. 92-1223

OFFICE OF THE CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1992

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF  
NAVY, NAVY CBG EXCHANGE, CONSTRUCTION BATTAL-  
ION CENTER, GULFPORT, MISSISSIPPI, and the U.S. DE-  
PARTMENT OF DEFENSE, ARMY AND AIR FORCE EX-  
CHANGE, DALLAS, TEXAS,

*Petitioners,*

v.

FEDERAL LABOR RELATIONS AUTHORITY and  
AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO,

*Respondents.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

MEMORANDUM FOR RESPONDENTS AMERICAN  
FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

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No. 92-1223

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U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF NAVY, NAVY CBG EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, and the U.S. DEPARTMENT OF DEFENSE, ARMY AND AIR FORCE EXCHANGE, DALLAS, TEXAS,

*Petitioners,*

v.

FEDERAL LABOR RELATIONS AUTHORITY and  
AMERICAN FEDERATION OF GOVERNMENT  
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*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

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**MEMORANDUM FOR RESPONDENTS AMERICAN  
FEDERATION OF GOVERNMENT EMPLOYEES,  
AFL-CIO**

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The Respondent, American Federation of Government Employees, submits that the *certiorari* petition in this case should be granted so that this Court can determine whether—as the Federal Labor Relations Authority (FLRA) has repeatedly held—it is an unfair labor practice under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 701 *et seq.* (FLRS), for a fed-

eral agency to refuse the request of a labor organization that represents a bargaining unit of the agency's employees to provide the union with the names and home addresses of the unit employees.<sup>1</sup>

The petition states—correctly in our view—that this “case presents a recurring issue on which there is an acknowledged conflict in the circuits,” Pet. 8, and that the issue thus squarely presented is of “considerable importance to federal employees,” Pet. 13, and, we would add, to the proper functioning of the federal labor relations system. In this regard, it suffices to note that the FLRA has issued more than 60 “names and addresses” cases; that between 1989 and 1992, all of the courts of appeals other than the Tenth Circuit have been called upon to issue a decision in this area; and that the circuits are hopelessly split. *See* Pet. 11-13 (collecting cases).

To avoid any possible misunderstanding, we hasten to add that we most emphatically disagree with the petitioners’ claim that the court below erred in upholding the FLRA’s ruling that an agency refusal of a union’s names and addresses request is an unfair labor practice. *See* Pet. 9-11. At this juncture we would note only the following.

*First*, the FLRA has recognized that “[A] union’s statutory responsibilities extend to all bargaining unit members. It is obvious that a union must be able to identify and communicate with those bargaining unit members if it is to adequately represent them.” Pet. App. 5a, quoting *Farmers Home Administration Finance Office v. American Federation of Government Employees, Local 3354*, 23 FLRA 788, 796 (1986). Accordingly, the Agency has concluded “that disclosure of the [unit employees] names and addresses was necessary because

<sup>1</sup> It is our understanding that the other respondent herein—the FLRA—is filing a memorandum stating that the Authority does not oppose the granting of the petition.

it would ‘enable the Union to communicate effectively and efficiently, through direct mailings to individual employees.’” Pet. App. 6a, quoting *id.*

*Second*, the “agencies have contended, over the life of this dispute, that disclosure of their employees’ names and home addresses is ‘prohibited by law.’” Pet. App. 10a, citing the Privacy Act, 5 U.S.C. § 552a and the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). Originally “the FLRA and the courts of appeals all agreed that the FLRS and the FOIA together required the disclosure of employees’ names and addresses.” Pet. App. 15a (collecting cases).

*Third*, this consensus became undone by a disagreement as to the meaning and effect of this Court’s decision in *U.S. Department of Justice v. Reporters’ Committee*, 489 U.S. 749 (1989). After noting that because of the entirely different contexts of the two cases, *Reporters’ Committee* is distinguishable on two different grounds, Pet. App. 19a-20a, the court below stated:

[W]e think it clear that the Supreme Court’s opinion in *Reporters’ Committee* is limited to the situation that arises when disclosure is sought under the FOIA alone, such that only the interests served by the FOIA may be included in the balancing. *Reporters’ Committee* simply does not apply when disclosure is commanded by some statute other than the FOIA, a statute which borrows the FOIA’s disclosure calculus for another purpose. When, as here, disclosure is sought through the FOIA only because the FOIA has been incorporated into another statute as a mechanism for disclosure of information, it is entirely proper and necessary—if all of Congress’ aims are to be achieved—to weigh into the balance the interests recognized by the statute which generates the request for information. [Citations omitted.]

Indeed, it would require a particularly convoluted line of reasoning to conclude that the Congress, while

1) expressly recognizing the great public interest in collective bargaining, 2) acting to protect that interest, and 3) providing for disclosure of information according to a "formula which encompasses, balances, and protects all interests," would nevertheless forbid the federal courts to consider the public interest in collective bargaining when balancing the interests favoring and opposing disclosure of information which is conceded to be necessary to the full and proper conduct of collective bargaining.

As we will develop if *certiorari* is granted, that is the correct reading of the applicable statutes in question and of *Reporters' Committee*.

#### **CONCLUSION**

For the reasons stated above, the Court should grant the *certiorari* petition in this case.

Respectfully submitted,

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In the Supreme Court of the United States  
OCTOBER TERM, 1992

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,  
PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**QUESTION PRESENTED**

Whether the Privacy Act of 1974 protects the home addresses of federal employees from disclosure.

## PARTIES TO THE PROCEEDING

The petitioners are the U.S. Department of Defense, U.S. Department of Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi, and the U.S. Department of Defense, Army and Air Force Exchange, Dallas, Texas. The respondents are the Federal Labor Relations Authority and the American Federation of Government Employees, AFL-CIO.

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**In the Supreme Court of the United States**  
**OCTOBER TERM, 1992**

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**No. 92-1223**

**UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,**  
**PETITIONERS**

*v.*

**FEDERAL LABOR RELATIONS AUTHORITY, ET AL.**

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***ON WRIT OF CERTIORARI TO THE***  
***UNITED STATES COURT OF APPEALS***  
***FOR THE FIFTH CIRCUIT***

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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 975 F.2d 1105. The opinions of the Federal Labor Relations Authority (Pet. App. 37a-42a and 52a-57a) are reported at 37 F.L.R.A. 652 and 37 F.L.R.A. 930.

**JURISDICTION**

The judgment of the court of appeals was entered on October 9, 1992. A petition for rehearing was denied on December 7, 1992. Pet. App. 35a-36a. The petition for a writ of certiorari was filed on January 19, 1993, and was granted on March 29,

1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATUTES INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides, in pertinent part:

(b) This section does not apply to matters that are—

\* \* \* \* \*

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information \* \* \* (C) would reasonably be expected to constitute an unwarranted invasion of personal privacy[.]

2. The Privacy Act of 1974, 5 U.S.C. 552a(b), states, in pertinent part:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

\* \* \* \* \*

(2) required under section 552 of this title [FOIA];

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section[.]

3. The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7114, provides, in pertinent part:

(b) the duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

\* \* \* \* \*

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

\* \* \* \* \*

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]

#### STATEMENT

1. This case, which is typical of approximately 60 cases that have been decided by the Federal Labor Relations Authority (FLRA), arises out of requests by two unions for the home addresses of the federal employees in the bargaining units represented by the unions. One request was made by Local 1657 of the United Food and Commercial Workers Union, which represents employees at the Navy Exchange in Gulfport, Mississippi. The other request was made by Local 1345 of the American Federation of Government Employees, which represents employees of the Dallas-based Army and Air Force Exchange Service. Pet. App. 2a-3a. Since the unions have the home addresses of their members, the practical effect of the request was to seek the home addresses of members of the bargaining unit who have chosen not to join

the unions. In response to the requests, the relevant agency provided the names and work stations of members of the bargaining unit, but not their home addresses. C.A. App. 58, 60, 113.

The unions sought the home addresses pursuant to 5 U.S.C. 7114(b)(4), part of the Federal Service Labor-Management Relations Statute (Labor Statute), which generally requires federal employers to provide information that is necessary for collective bargaining. The Labor Statute also provides, however, that disclosure is required only "to the extent not prohibited by law." In declining to disclose the employees' home addresses, the agencies relied on 5 U.S.C. 552a(b), part of the Privacy Act of 1974, which generally provides that federal agencies may not disclose any personal information without the consent of the person to whom the information pertains.

While the Privacy Act contains no exception authorizing the release of personal information that is relevant to collective bargaining, Exception (b)(2) of the Privacy Act authorizes the release of information where disclosure is required by the Freedom of Information Act (FOIA). 5 U.S.C. 552a(b)(2). FOIA, in turn, generally mandates the release of agency records, although FOIA Exemption 6 bars the release of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The unions argued in this case that disclosure of the employees' home addresses would not constitute "a clearly unwarranted invasion of personal privacy" under Exemption 6, so that disclosure is required by FOIA and hence is not prohibited by the Privacy Act.

2. When first presented with this issue in 1985, the FLRA held that federal agencies were prohibited by the Privacy Act from releasing employees' home addresses to unions. *Farmers Home Admin. Fin. Office*, 19 F.L.R.A. 195 (1985). A year later, the FLRA changed its position, in *Farmers Home Admin. Fin. Office*, 23 F.L.R.A. 788 (1986). Moreover, in the second *Farmers Home Administration* case the FLRA concluded that the agency was required to disclose employees' home addresses whether or not the union had adequate alternative means of communicating with members of the bargaining unit. Under FOIA Exemption 6, the FLRA balanced the employees' privacy interest in their home addresses against the enhancement of the collective bargaining process that would result from disclosure of home addresses, and held that the collective bargaining interest outweighed the privacy interest. 23 F.L.R.A. at 792-793. Several actions were filed based on the second *Farmers Home Administration* decision and, initially, a number of courts of appeals enforced orders requiring federal agencies to disclose the home addresses of federal employees.<sup>1</sup>

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<sup>1</sup> See *Department of Navy v. FLRA*, 840 F.2d 1131 (3d Cir.), cert. dismissed, 488 U.S. 881 (1988); *Department of Air Force, Scott Air Force Base v. FLRA*, 838 F.2d 229 (7th Cir.), cert. dismissed, 488 U.S. 880 (1988); *HHS v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), cert. dismissed, 488 U.S. 880 (1988). The Eighth Circuit rejected the FLRA's position in part, holding that some employees have a sufficient privacy interest in their home addresses to prevent disclosure. *Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), vacated on other grounds and remanded, 488 U.S. 1025 (1989). The Second Circuit had decided that the home addresses should be released even before the FLRA issued

However, in *FLRA v. Department of Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990), the District of Columbia Circuit, which has concurrent jurisdiction over petitions for review of FLRA decisions (5 U.S.C. 7123(a)), declined to enforce an FLRA order requiring the disclosure of home addresses. In so holding, the D.C. Circuit relied on this Court's then-recent decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In *Reporters Committee*, this Court held that whether disclosure is warranted under FOIA "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny.'"'" *Id.* at 772, quoting *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976). The Court in *Reporters Committee* reasoned that FOIA "focuses on the citizens' right to be informed about 'what their government is up to,'" and held that that purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." 489 U.S. at 773 (citation omitted). The D.C. Circuit concluded that the release of home addresses of federal employees tells little or nothing about "what the government is up to," and accordingly held that the unions' interest in obtaining those home addresses did not "outweigh the workers' significant interest in privacy." 884 F.2d at 1453.

The D.C. Circuit specifically rejected the FLRA's contention that the interest in fostering collective bar-

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its second *Farmers Home* decision. *AFGE, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986).

gaining should be weighed in the balance under FOIA Exemption 6. The court first noted that "*Reporters Committee* itself stated that 'the identity of the requesting party has no bearing on the merits of his or her FOIA request.'" 884 F.2d at 1453, quoting 489 U.S. at 771. The court added that "[t]he reading proposed by the Authority would in effect construe [Privacy Act exception (b)(2)] as encompassing disclosures required 'under FOIA or any agency decision based on a disclosure-related statute,'" and declined to "engage in the sort of imaginative reconstruction that would be necessary to introduce collective bargaining values into the balancing process." 884 F.2d at 1453.

In a concurring opinion, Judge Ruth Ginsburg questioned whether Congress actually intended to protect employees' home addresses from disclosure to unions, but concluded that "the logic of the court's opinion is irreproachable." 884 F.2d at 1457. She explained, first, that "[t]he broad cross-reference in 5 U.S.C. 7114(b)(4)—'to the extent not prohibited by law'—picks up the Privacy Act unmodified; that Act, in turn, shelters personal records absent the consent of the person to whom the record pertains, unless disclosure would be required under the Freedom of Information Act." 884 F.2d at 1457. "Once placed wholly within the FOIA's domain," Judge Ginsburg continued, "the union requesting information relevant to collective bargaining stands in no better position than members of the general public." *Ibid.* And she agreed that members of the general public have no right, under FOIA, to obtain lists of the home addresses of federal employees.

The FLRA declined to follow the D.C. Circuit's decision. In the *Portsmouth* case, *United States De-*

partment of the Navy, *Portsmouth Naval Shipyard*, 37 F.L.R.A. 515, 530 (1990), application for enforcement denied and cross-petition for review granted *sub nom. FLRA v. United States Dep't of the Navy*, 941 F.2d 49 (1st Cir. 1991), the FLRA “recognize[d] that exception (b)(2) of the Privacy Act makes no reference to laws other than the FOIA itself,” but “disagree[d] with the conclusion of the D.C. Circuit that to introduce the purposes of another disclosure statute into the balancing required by FOIA would be an impermissible ‘imaginative reconstruction.’” The FLRA also noted that private sector unions generally may obtain lists of names and home addresses of bargaining unit members, and concluded that “Federal sector employees should expect no greater privacy with respect to their exclusive representative \* \* \* than private sector employees are accorded,” even though “private sector employees are not covered by the Privacy Act as are \* \* \* Federal employees.” 37 F.L.R.A. at 536.

Turning to the balancing required under FOIA Exemption 6, the FLRA in *Portsmouth* recognized that federal unions may contact employees at work, but found home contact preferable because “[i]n the home environment, the employee has the leisure and the privacy to give the full and thoughtful attention to the union’s message that the workplace generally does not permit.” 37 F.L.R.A. at 532. The FLRA also “acknowledge[d] that any list of names and home addresses is subject to uses that may not have been contemplated when it was originally disclosed” (*id.* at 533), but found that the union’s interest in contacting employees at home rather than at work outweighed the employees’ privacy interest. Following its announcement of the *Portsmouth* decision, the

FLRA sought to create a conflict with the D.C. Circuit; in fact, the FLRA filed an enforcement action in each regional court of appeals.

3. The majority of the courts of appeals rejected the FLRA’s position. *FLRA v. United States Dep't of Defense, Army & Air Force Exch. Serv.*, 984 F.2d 370 (10th Cir. 1993); *FLRA v. United States Dep't of Defense*, 977 F.2d 545 (11th Cir. 1992); *Department of Navy, Navy Exchange v. FLRA*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of Navy, Naval Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. United States Dep't of the Navy, Naval Communications Unit*, 941 F.2d 49 (1st Cir. 1991). However, the Fifth Circuit enforced the FLRA’s order requiring the disclosure of employees’ home addresses in this case.<sup>2</sup>

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<sup>2</sup> Panels in the Ninth and Fourth Circuits had granted enforcement of FLRA orders requiring the disclosure of home addresses, but the Fourth Circuit panel’s judgment was vacated, and a rehearing petition is pending in the Ninth Circuit. *FLRA v. United States Dep't of Navy, Navy Resale & Support Servs. Office*, 958 F.2d 1490 (9th Cir. 1992); *FLRA v. United States Dep't of Commerce, NOAA*, 954 F.2d 994 (4th Cir. 1992), vacated and reh’g granted (Apr. 22, 1992). The en banc Third Circuit also had upheld an FLRA disclosure order, but its holding was not based on FOIA Exemption 6. *FLRA v. United States Dep't of Navy, Navy Ships Parts Control Center*, 966 F.2d 747 (1992). The Third Circuit’s decision instead was based on the court’s conclusion that disclosure of home addresses was required by a “routine use” regulation promulgated by the Office of Personnel Management (OPM) (49 Fed. Reg. 36,949, 36,956 (1984)), even though OPM had interpreted its regulation to bar the release of home addresses unless there are no adequate alternative means of communicating with the members of the bargaining

The Fifth Circuit concluded that the seven circuits that rejected the FLRA's position "have read too much into *Reporters Committee*" (Pet. App. 18a), and distinguished this Court's decision in *Reporters Committee* on two grounds. First, the court stated, *Reporters Committee* involved a different FOIA privacy exemption, Exemption 7(C), which protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information \* \* \* could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The court of appeals noted the differences between Exemption 6 and Exemption 7(C): while "Exemption 6 mandates that the invasion of privacy be 'clearly unwarranted,' Exemption 7(C) requires that the invasion of privacy be merely 'unwarranted,'" and "while Exemption 6 applies to disclosures which 'would constitute' an invasion of privacy, Exemption 7(C) pertains to disclosures which 'could reasonably be expected to constitute'

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unit. The Third Circuit declined to rely on the OPM regulations, explaining that "until the OPM publishes its interpretation in a manner sufficient to place the public on notice of both the existence and content of that interpretation, we will not defer to the OPM's interpretation." 966 F.2d at 762. OPM subsequently published its interpretation in *Federal Personnel Manual Letter 711-164*. The FLRA has since recognized that "FPM Letter 711-164 governs interpretation" of the routine use regulation. *United States Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms*, 46 F.L.R.A. No. 22 (Oct. 23, 1992), slip op. 10. Accordingly, there is no longer any basis for arguing that unions may obtain employees' home addresses under the routine use regulation in the normal case—such as this one—where unions may contact employees at work.

such an invasion." Pet. App. 19a-20a. The court, however, did not elaborate on the significance of those differences.

Second, the court of appeals stated that, unlike the requests in *Reporters Committee*, the unions' disclosure requests do not arise under FOIA, but originate from the Labor Statute and "its Congressionally endorsed framework for protecting and promoting collective bargaining." Pet. App. 20a. The court concluded that "*Reporters' Committee* is limited to the situation that arises when disclosure is sought under the FOIA alone." *Id.* at 23a. Once the interest in promoting collective bargaining is considered, the court held, "disclosure of the employees' names and addresses would not constitute a clearly unwarranted invasion of privacy, and is not prohibited by the Privacy Act." *Id.* at 26a. Thus, the court enforced the FLRA's order even though it "acknowledged that if one applies the restrictions announced in *Reporters' Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited." *Id.* at 19a.

Judge Emilio Garza dissented. He noted that the Labor Statute provides that federal agencies must furnish unions with information "which is reasonably available and necessary for \* \* \* collective bargaining," but further provides that they may do so only "to the extent not prohibited by law." 5 U.S.C. 7114(b)(4)(B). Since the Privacy Act would bar the release of employees' home addresses unless FOIA Exemption 6 requires disclosure, he reasoned this case turns on the latter question. Unlike his colleagues, Judge Garza found no basis for weighing

collective bargaining considerations in the balance under Exemption 6. Pet. App. 30a-34a & n.7. Judge Garza also found no merit to the suggestion that *Reporters Committee* may be distinguished because Exemption 6 differs in some respects from Exemption 7(C). He explained that “[t]he difference between Exemption[s] 6 and 7(C) goes *only* to the degree of personal privacy needed to outweigh the public interest,” while “the public interest factor remains the same under both exemptions.” Pet. App. 30a. Judge Garza concluded that disclosure of employees’ home addresses is not warranted because release would not disclose anything about what the government is “up to,” but would impinge on employees’ right to privacy. *Id.* at 27a, 34a n.7.

#### **SUMMARY OF ARGUMENT**

It is undisputed that the release of employees’ home addresses is barred by the Privacy Act unless disclosure is required by Exemption (b)(2), which authorizes disclosures mandated by FOIA. Accordingly, the focus of this case is on FOIA, and the result turns on what should be weighed on the disclosure side of the balance under FOIA Exemption 6. Contrary to the FLRA’s contention, there is no basis for weighing collective bargaining interests in the balance under FOIA Exemption 6. No Privacy Act exemption provides for the release of information that is useful for collective bargaining purposes. Privacy Act Exemption (b)(2) instead directs attention to FOIA and only to FOIA. In *Reporters Committee*, this Court made clear that the purpose of FOIA is to make available “[o]fficial information that sheds light on an agency’s performance of its statutory duties”

(489 U.S. at 773), and the Court further held that neither the identity of the requesting party nor the specific purpose of the request is relevant (*id.* at 771). Those principles make clear that there is no interest under FOIA favoring the release of information that facilitates collective bargaining but does not shed light on what the government is “up to.”

On the other hand, the disclosure of employees’ home addresses infringes substantial privacy interests. By itself, a home address may tell a lot about a person. Moreover, home address lists could be used by unions and others to contact federal employees at home, where many employees desire to be let alone. While the courts of appeals have differed with respect to their evaluation of the extent of the intrusion on privacy that results from the disclosure of federal employees’ home addresses, all courts agree that disclosure compromises legitimate privacy interests to some extent.

Accordingly, as the Fifth Circuit acknowledged in this case (Pet. App. 19a), the interest in disclosure is outweighed by the employees’ privacy interest if all that is weighed on the disclosure side of the balance under FOIA Exemption 6 is what the information says about what the government is “up to.” Contrary to the FLRA’s suggestions, there is nothing surprising or inequitable about that result. Unlike private sector employees, federal employees are protected by the Privacy Act, which was intended to protect personal information that happens to be in government files. Moreover, the FLRA has held that employees’ home addresses must be released to unions no matter how much access unions have to employees at work. Since unions can always ask federal em-

ployees for their home addresses, the practical result of the Fifth Circuit's decision is limited to requiring the release of the home addresses of those employees who have chosen not to join unions, do not want to provide their addresses to unions, and prefer not to be contacted at home.

#### ARGUMENT

##### THE PRIVACY ACT PROTECTS THE HOME ADDRESSES OF FEDERAL EMPLOYEES FROM DISCLOSURE

The disclosure of personal information held in government files is generally prohibited by the Privacy Act (5 U.S.C. 552a(b)), and it is not disputed that the home addresses of federal employees constitute personal information. Accordingly, the disclosure of employees' home addresses is barred by the Privacy Act unless the disclosure falls within Exception (b) (2) of the Privacy Act, 5 U.S.C. 552a(b) (2)—the provision authorizing the release of information "required under" FOIA. It does not. FOIA Exemption 6 prohibits the disclosure of information "which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Disclosure is not warranted because the release of employees' home addresses would impinge on the employees' interest in protecting the privacy of their homes without disclosing anything about what the government is "up to." *Reporters Committee*, 489 U.S. at 773.

###### A. The Relevant Public Interest In Disclosure Of Federal Employees' Home Addresses Is Insubstantial

Under FOIA Exemption 6, courts must balance the public interest in disclosure against the privacy

interest that would be compromised by disclosure. The key dispute in this case concerns what is weighed on the public interest side of the balance under FOIA Exemption 6. The Fifth Circuit candidly acknowledged that "disclosure of the employees' names and addresses \* \* \* does not advance the public interest served by the FOIA—opening agency action to the light of public scrutiny." Pet. App. 18a. The court enforced the FLRA's disclosure order because it concluded that it was appropriate to consider "the public interest served by the [Labor Statute]—protection and promotion of collective bargaining." *Ibid.*

The court of appeals erred. Collective bargaining interests may not be weighed in the balance under FOIA Exemption 6, except through what the D.C. Circuit termed "imaginative reconstruction" of FOIA. *FLRA v. Department of Treasury*, 884 F.2d at 1453. It is true, as the Fifth Circuit emphasized (Pet. App. 20a), that the disclosure request in this case originated under the Labor Statute. But the Labor Statute expressly provides that agencies are to provide information to unions only "to the extent not prohibited by law" (5 U.S.C. 7114(b)(4)), and the Privacy Act is a law that generally prohibits the disclosure of personal information contained in agency files. No exception to the Privacy Act provides for the release of information that promotes collective bargaining. The only relevant exception to the Privacy Act (5 U.S.C. 552a(b)(2)) provides for the release of information required to be disclosed by FOIA, and nothing in FOIA provides for the release of information that promotes collective bargaining. Thus, while this case began with a re-

quest for information under the Labor Statute, that request is barred by the Privacy Act unless FOIA mandates disclosure.<sup>3</sup>

As Judge Ginsburg explained in her concurrence in the *Treasury* case, “[o]nce placed wholly within the FOIA’s domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public.” 884 F.2d at 1457. That conclusion is mandated by the terms of the relevant statutes. In the absence of FOIA, there would be no basis for the FLRA’s argument that disclosure is warranted: the request would be barred by the Privacy Act, and no exception would even arguably apply. Exception (b)(2) of the Privacy Act arguably applies, but that exception authorizes the disclosure of information that must be released under FOIA and does not authorize release in any other circumstance. Thus, there is no statu-

<sup>3</sup> See *FLRA v. United States Dep’t of Defense, Army & Air Force Exch. Serv.*, 984 F.2d at 374-375; *FLRA v. United States Dep’t of Defense*, 977 F.2d at 548 (“[W]e find no authority for allowing Labor Statute principles to override FOIA principles and, in turn, the Privacy Act. Such an interpretation contravenes the Labor Statute’s own rule that disclosure be allowed only ‘to the extent not prohibited by law.’”); *United States Dep’t of Navy, Navy Exchange v. FLRA*, 975 F.2d at 354 (“[n]either [the Privacy Act], nor FOIA, makes a further exception for information requests that originate under some other federal statute”); *FLRA v. Department of Veterans Affairs*, 958 F.2d at 512 (“[n]owhere do we find a qualification that the policies of collective bargaining should be integrated into FOIA”); *FLRA v. United States Dep’t of Navy, Naval Communications Unit*, 941 F.2d at 57, n.11 (“[w]e decline \* \* \* to alter clear principles of FOIA analysis by an imaginative reading of the Labor Statute’s plain requirement that the disclosure not be ‘prohibited by law’”).

tory basis on which to construct two FOIA tests, one for requests arising under FOIA and one for requests originating under the Labor Statute.

Courts “are not at liberty to create an exception where Congress has declined to do so.” *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2636 (1991). See also *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992) (“[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstance, is finished”). Congress created no exception to the Privacy Act authorizing the release of information that promotes collective bargaining, and the FLRA’s decision to read such an exception into the Privacy Act is not entitled to deference. *FLRA v. Department of Treasury*, 884 F.2d at 1451 (citations omitted) (“[a]s the FLRA is not charged with a special duty to interpret either the Privacy Act or the FOIA, we do not defer to its interpretations of those statutes but review them *de novo*”); see also *Department of Navy v. FLRA*, 840 F.2d 1131, 1134 (3d Cir.), cert. dismissed, 488 U.S. 881 (1988); *West Point Elementary School Teachers Ass’n v. FLRA*, 855 F.2d 936, 940 (2d Cir. 1988) (“an FLRA decision is not entitled to \* \* \* deference when it interprets a statute other than the [Labor Statute] or resolves a conflict between the [Labor Statute] and another statute”).

The conclusion that a union requesting home addresses under FOIA is in no better position than anyone else requesting the same information necessarily follows from this Court’s decision in *Reporters Committee*. This Court made clear that “the identity

of the requesting party has no bearing on the merits of his or her FOIA request," and that "the purposes for which the request for information is made" are not relevant. 489 U.S. at 771. The Fifth Circuit's decision, which is premised on the fact that a union requested the employees' home addresses for the purpose of advancing collective bargaining interests, cannot be reconciled with this Court's holding that neither the identity of the requester nor the purpose of the request is relevant under FOIA.

That conclusion is not affected by the fact that *Reporters Committee* did not involve a request for information that arose under the Labor Statute. Just as nothing in FOIA suggests that it is appropriate to consider the public interest in promoting collective bargaining, nothing in the Labor Statute suggests that its purposes find their way into the balance under FOIA Exemption 6. As the Second Circuit explained: "Nowhere in the [Labor Statute] does its language indicate that the disclosure calculus required by FOIA should be modified. Nowhere do we find a qualification that the policies of collective bargaining should be integrated into FOIA." *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d at 512. All that is found in the Labor Statute is a direction to disclose information pertinent to collective bargaining "to the extent not prohibited by law." 5 U.S.C. 7114(b)(4).

Nor is *Reporters Committee* distinguishable because it involved FOIA Exemption 7(C) rather than FOIA Exemption 6. As Judge Garza explained in his dissenting opinion below, Exemption 7(C) is more protective of privacy interests than is Exemption 6: Exemption 7(C) bars any disclosure that "could reasonably be expected to constitute" an invasion of privacy that is "unwarranted," while Ex-

emption 6 bars any disclosure that "would constitute" an invasion of privacy that is "clearly unwarranted." But the relevant teaching of *Reporters Committee* relates to determining what is to be weighed on the public interest side of the balance. Pet. App. 30a.<sup>4</sup> Thus, *Reporters Committee* is relevant in this case because it makes clear that there is very little or nothing on the disclosure side of the balance. In a case arising under Exemption 6, a more substantial privacy interest may be required to outweigh an interest in disclosure than in a case arising under Exemption 7(C), but that difference is not relevant to determining what interests are to be placed on the public interest side of the scale.

What is weighed on the disclosure side of the balance under FOIA Exemption 6 was spelled out in this Court's decision in *Reporters Committee*— "[o]fficial information that sheds light on an agency's performance of its statutory duties." 489 U.S. at 773. At the same time, the Court made clear that the "disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's conduct" is not permitted, because such information says little or nothing about what the government is "up to." *Ibid.* In other words, whether disclosure is warranted "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency

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<sup>4</sup> In *United States Dep't of State v. Ray*, 112 S. Ct. 541, 549 (1991) (quoting *Reporters Committee*, 489 U.S. at 773, and *Rose*, 425 U.S. 352 360-361 (1976)), an Exemption 6 case, this Court recognized that FOIA "focuses on the citizens' right to be informed about "what their government is up to."'"

action to the light of public scrutiny." " *Id.* at 772, quoting *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976). The Fifth Circuit acknowledged in this case that "[r]elease of the employees' names and addresses would not in any meaningful way open agency action to the light of public scrutiny." Pet. App. 19a.

**B. The Disclosure Order Infringes Employees' Privacy Interests**

In *Reporters Committee*, this Court also concluded that "privacy encompass[es] the individual's control of information concerning his or her person." 489 U.S. at 763. Indeed, the Court recognized that control over information is at the heart of the legal concept of privacy. See *id.* at 762-764 & n.16. Accordingly, the Court held that the subject of a "rap sheet" had a significant privacy interest in restricting its dissemination, even though the information on the rap sheet was public knowledge. The courts of appeals subsequently have properly recognized that Exemption 6 is not limited to "embarrassing" or "intimate" information, but involves an individual's interest in limiting the dissemination of any personal information. See, e.g., *Hopkins v. United States Dep't of HUD*, 929 F.2d 81, 87 (2d Cir. 1991); *National Ass'n of Retired Fed. Employees v. Horner (NARFE)*, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

The information at issue in this case involves one of the chief bastions of privacy—the home. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970) ("[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality"). Fed-

eral employees reasonably may wish to control access to their home addresses. As an initial matter, "an address tells much more than just where a person lives." *FLRA v. United States Dep't of Defense*, 977 F.2d at 549. By releasing an employees' home address, the agency would be disclosing not only the address itself, but also information concerning the location of the employee's home, the type of neighborhood the employee lives in, and perhaps even the lifestyle or affluence of that employee. Thus, the disclosure of a list of names and home addresses, by itself, reveals significant personal information.

Moreover, the right to be free from unwanted intrusions in one's home should not be minimized. In his dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Mr. Justice Brandeis characterized "the right to be let alone" as the "right most valued by civilized men." Many people do not want to be disturbed by work-related matters at home. In particular, many federal employees who have not joined a union do not want to be disturbed at home by union officials. For example, in *Veterans Administration, Riverside National Cemetery*, 33 F.L.R.A. 316, 317 (1988), 22 of the 34 members of the bargaining unit asked the agency to keep their home addresses confidential. (The FLRA ordered their release to the union anyway.) Some federal employees have specific reasons for keeping their home addresses out of union hands. For example, in *Department of the Navy, U.S. Naval Ordnance Station*, 33 F.L.R.A. 3, 5 (1988), an employee wanted his home address to be kept private because he had been threatened at home by a union member. (The FLRA nevertheless ordered the release of the home addresses of all members of the bargaining unit, be-

cause it concluded that there was no evidence of "imminent danger.") Thus, even if home address lists were available only to unions, significant privacy interests would be compromised.

But there is no basis for restricting disclosure to unions. First, as the FLRA acknowledged in its *Portsmouth* decision, "any list of names and home addresses is subject to uses that may not have been contemplated when it was originally disclosed." 37 F.L.R.A. at 533. In other words, as a practical matter, once home addresses are released to a union there is no assurance that the union or its members may not further disseminate the list. *FLRA v. United States Dep't of Defense*, 977 F.2d at 549 n.6; *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d at 511 ("granting disclosure here would threaten a privacy interest because it would be impossible to assure that the uses to which the employee list would be put by the union would be limited to those contemplated by the parties' relationship"); *FLRA v. United States Dep't of Treasury*, 884 F.2d at 1452. Second, as we have explained, there is no basis on which to construct one FOIA test for unions and another for other requesters. Thus, if the information "must be released to one requester, it must be released to all, regardless of the uses to which it might be put." *Painting & Drywall Work Preservation Fund, Inc. v. Department of HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991); accord *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d at 510-511.

Because home address lists communicate specific traits shared by a community of federal employees, they have considerable commercial value to businesses, solicitors, marketing experts, insurance com-

panies, social scientists, pollsters, and others, and there would be no shortage of prospective users of such lists. As the D.C. Circuit observed in *NARFE*, "one need only assume that business people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly" in order to recognize that many such prospective users would seek home address lists. 879 F.2d at 878.<sup>5</sup> In the *Treasury* case, the D.C. Circuit correctly concluded that, if employees' home addresses are disclosed, employees may be exposed to unwanted barrages of mailings and solicitations from businesses and fund-raising organizations, as shown by the numerous FOIA requests that have been filed by entrepreneurs seeking to contact government employees. 884 F.2d at 1452.

Various courts of appeals have accordingly held that the release of employees' home addresses would compromise substantial privacy interests. See *FLRA v. Department of Navy, Naval Communications Unit*, 941 F.2d at 58; see *id.* at 55-56 ("we believe a discernible interest exists in the ability to retreat to the seclusion of one's home and to avoid enforced disclosure of one's address"); *NARFE*, 879 F.2d at 875 ("the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant"); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d at 510 ("an individual has a general privacy interest in prevent-

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<sup>5</sup> In *United States Dep't of State v. Ray*, 112 S. Ct. 541, 548 n.12 (1991), this Court quoted the *NARFE* decision, "agree[ing] with the Court of Appeals for the District of Columbia Circuit that whether disclosure of a list of names is a 'significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.'"

ing dissemination of his or her name and home address"); *United States Dep't of Navy, Navy Exchange v. FLRA*, 975 F.2d at 353 ("we hold that federal employees have a privacy interest in the non-disclosure of their names and home addresses"); *FLRA v. United States Dep't of Defense*, 977 F.2d at 549 ("we think the privacy interest in a home address is important"). Even the Fifth Circuit in this case, while discounting the privacy interest affected by disclosure, acknowledged that federal employees have "at least some legitimate interest in keeping private their names and home addresses." Pet. App. 12a.

**C. The Privacy Interests Compromised By Disclosure Of Employees' Home Addresses Outweigh the Relevant Public Interest In Disclosure**

It is essentially undisputed that federal employees' interest in protecting the privacy of their homes outweighs the interest in disclosure unless the interest in promoting collective bargaining is included in the balancing. That is, it is clear that federal employees have a privacy interest in controlling access to their addresses, while the release of those addresses says very little or nothing about how the government is doing its work. Thus, as the Fifth Circuit stated in this case, "if one applies the restrictions announced in *Reporters' Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited." Pet. App. 19a.

Contrary to the FLRA's contentions, there is nothing surprising or inequitable about that conclusion. In *Reporters Committee*, this Court noted that "disclosure of records regarding private citizens, identi-

fiable by name, is not what the framers of the FOIA had in mind." 489 U.S. at 765. Cf. *id.* at 767 (discussing the Privacy Act's reflection of "Congress' basic policy concern[s] regarding the implications of computerized data banks for personal privacy"). See also *Whalen v. Roe*, 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. \* \* \* The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures."). What would be surprising would be if the Labor Statute and the Freedom of Information Act were construed to convert the federal government into a clearinghouse for the release of the vast array of private information necessarily held in government files. Congress enacted the Privacy Act to prevent such abuses.

It appears, however, that the FLRA has significantly undervalued the privacy rights of federal employees. It has extended its *Portsmouth* decision beyond home addresses to require the release of various sorts of personal information about federal employees. For example, the FLRA has ordered the release of unsanitized employee disciplinary files and performance ratings and appraisals. See, e.g., *Department of Labor v. FLRA*, 39 F.L.R.A. 531 (1991), remanded on other grounds, No. 91-1174 (D.C. Cir. Order of Jan. 7, 1992) (unredacted suspension records); *FLRA v. Department of Commerce*, 38 F.L.R.A. 120 (1990), rev'd, 962 F.2d 1055 (D.C. Cir. 1992) (names and duty stations of employees receiving outstanding or commendable ratings); *Department of HHS v. FLRA*, 43 F.L.R.A. 164 (1991),

rev'd, No. 92-1012 (D.C. Cir. Dec. 10, 1992) (unsanitized performance appraisals). Moreover, the FLRA has required bargaining over the release of unsanitized notices stating that an agency suspects that a particular employee is abusing drugs. Those notices would be released to a union without the consent of the employees to whom the notices are issued. *Department of Energy v. FLRA*, 41 F.L.R.A. 1241 (1991), appeal pending, No. 91-1514 (D.C. Cir.).

Contrary to the FLRA's suggestions, it is not the case that Section 7114(b)(4)(B)—the provision in the Labor Statute requiring agencies to provide, "to the extent not prohibited by law," information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining"—would be a dead letter under our view. First, most of the information requested by unions under Section 7114(b)(4)(B) either does not concern individual employees at all or does not impinge upon their privacy. Examples include the disclosure of general information concerning conditions of employment; information on facilities; data on health and safety matters; memoranda on reorganizations, reductions-in-force, and work schedules; and statistical information on seniority.\* Most of that type of information is released

\* See, e.g., *Department of Justice, United States Immigration & Naturalization Service*, 23 F.L.R.A. 239 (1986) (daily assignment and equipment logs released); *United States Dep't of Defense, Dep'ts of the Army & the Air Force*, 19 F.L.R.A. 652 (1985) (the union received information relating to which components were planning personnel reductions). Although management asserted other reasons for noncompliance with the specific requests (e.g., the request was burdensome or the information was unavailable), in neither case was a question raised concerning any privacy interest.

as a matter of course without any controversy or litigation, and the decision in this case will not affect such disclosures. It is only in those instances when information about specific individuals is requested, and the individuals do not consent to the release of the information, that a determination must be made as to whether disclosure would violate the Privacy Act. Moreover, relevant records concerning disciplinary actions, overtime, grievances, leave, and travel often can be released to unions in a sanitized fashion, thus protecting the privacy interests of the individual employees while at the same time assisting the unions in performing their collective bargaining duties.<sup>7</sup>

In its *Portsmouth* decision, the FLRA put great weight on the fact that private sector unions almost always obtain home address lists, and concluded that "Federal sector employees should expect no greater privacy \* \* \* than private sector employees are accorded." 37 F.L.R.A. at 536. But the Labor Statute "is not a carbon copy of the NLRA, nor is the authority of the FLRA the same as that of the NLRB." *Karahalios v. NFFE, Local 1263*, 489 U.S. 527, 532, 534 (1989). See also *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 648 (1990) (the National Labor Relations Act and Postal Reorganization Act "deal with labor-management relations in entirely different fields of employment, and the [Labor Stat-

<sup>7</sup> See *Veterans Admin. Medical Center*, 32 F.L.R.A. 133 (1988) (union acknowledged that it would be satisfied to receive the statistical information without names); *Department of Defense Dependents Schools, Washington, D.C. & Dep't of Defense Dependents Schools, Germany Region*, 28 F.L.R.A. 202 (1987) (union indicated that it had no objection to receiving sanitized documents).

ute] contains no indication that it is to be read *in pari materia* with them"). Indeed, there are many important differences between federal employees and private sector employees. For example, federal employees are not allowed to strike (5 U.S.C. 7116 (b)(7)) and most cannot bargain about wages, which are set by Congress (see 5 U.S.C. 7102(2), 7103(a)(14)). Public employees also enjoy protections—notably those provided by the Bill of Rights—that do not restrict private sector employers. Among the statutory protections accorded federal employees is coverage under the Privacy Act, which applies only to public agencies. Moreover, the Labor Statute expressly provides that its disclosure provision does not override employees' Privacy Act rights, since disclosure is warranted under Section 7114(b)(4) only "to the extent not prohibited by law." The FLRA did not suggest in *Portsmouth* how that statutory command could be reconciled with its conclusion that federal employees' privacy rights must be limited to those of private sector employees.

Moreover, federal labor unions generally have ample opportunities to contact employees at work. There is no evidence that there are inadequate opportunities for contact at work in this case, where the agencies have provided lists of the work stations of the members of the bargaining units. See C.A. App. 58, 60, 113.<sup>8</sup> In addition, any union may negotiate

<sup>8</sup> In the unusual situation where unions do not have sufficient opportunities for contact at work, applicable regulations provide that most federal agencies must make arrangements to allow unions to contact employees at home. See 49 Fed. Reg. 36,949, 36,956 (1984); Federal Personnel Manual Letter 711-164; note 2, *supra*. Those regulations do not apply to employees of military exchange services, however.

for additional rights to contact federal employees at work and, in contrast to the private sector, such proposals may be imposed on agencies over their objection by the Federal Service Impasses Panel, which is part of the FLRA. See 5 U.S.C. 7119(c)(5). Thus, any federal union may ensure that it will have ample opportunities to contact employees at work. There is no reason why, during such contacts, the unions cannot ask the employees for their home addresses. Of course, the unions would not obtain the home addresses of those employees who did not want the union to have them. But the fact that individual federal employees may choose to exercise the rights Congress conferred on them in the Privacy Act is hardly a reason to abrogate those rights.

#### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1993

JUN 25 1993

OFFICE OF THE CLERK

**In the Supreme Court of the United States**  
**OCTOBER TERM, 1992**

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**U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF  
NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BAT-  
TALION CENTER, GULFPORT, MISSISSIPPI, ET AL.,  
PETITIONERS**

*v.*

**FEDERAL LABOR RELATIONS AUTHORITY, ET AL.**

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**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

**BRIEF FOR THE RESPONDENT  
FEDERAL LABOR RELATIONS AUTHORITY**

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### **QUESTION PRESENTED**

Whether the congressionally recognized public interest in facilitating federal sector labor relations is appropriately weighed in evaluating the release of federal employee names and home addresses to unions representing those employees, when the request is made under Section 7114(b)(4) of the federal sector labor statute.

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**In the Supreme Court of the United States****OCTOBER TERM, 1992****No. 92-1223**

**U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, ET AL., PETITIONERS** *v.*

**FEDERAL LABOR RELATIONS AUTHORITY, ET AL.**

*ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE RESPONDENT  
FEDERAL LABOR RELATIONS AUTHORITY**

**OPINIONS BELOW**

The opinion of the court of appeals is reported at 975 F.2d 1105, and is appended to the petition (Pet. App. 1a-34a). The decisions of the Federal Labor Relations Authority (Pet. App. 37a-64a) are reported at 37 F.L.R.A. 652 and 37 F.L.R.A. 930.

**JURISDICTION**

The judgment of the court of appeals was entered on October 9, 1992. A petition for rehearing and suggestion of rehearing *en banc* was denied on De-

(1)

ember 7, 1992. The petition for a writ of certiorari was filed on January 19, 1993 and was granted on March 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135, the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a(b), are reproduced in the appendix to this brief (FLRA App. 1a-6a).

### STATEMENT

#### A. Background—The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute (Labor Statute), as amended, 5 U.S.C. 7101-7135 (1988). Under the Labor Statute, the responsibilities of the Federal Labor Relations Authority (Authority), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Labor Statute. 5 U.S.C. 7104-7105.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983) (*BATF*); *Federal/Postal/Retiree Coalition v. Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, “to develop

specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Labor Statute].” *BATF*, 464 U.S. at 97.

Congress specified in the Labor Statute that “labor organizations and collective bargaining in the civil service are in the public interest.” 5 U.S.C. 7101(a). Consistent with this finding of Congress, the Labor Statute requires an agency to accord exclusive recognition to a labor organization selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election. 5 U.S.C. 7111(a). A labor organization accorded such exclusive recognition has an obligation to represent fairly “all employees in the unit” regardless of whether they are union members. 5 U.S.C. 7114(a)(1). Employees in a unit of exclusive recognition have the right to refrain from joining a labor organization as dues-paying members. 5 U.S.C. 7102. The agency and the labor organization have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. 7114(a)(4). The duty to bargain in good faith extends to matters relating to conditions of employment affecting bargaining unit employees. 5 U.S.C. 7103(a)(12) and 7117; *see also Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 644 (1990).

Congress enacted Section 7114(b)(4) of the Labor Statute to enable unions to meet their representational duties. That section requires a federal employer to furnish the exclusive bargaining representative “to the extent not prohibited by law” with any requested data that is, among other things, “reasonably available”; “normally maintained by the agency

in the regular course of business"; and "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." 5 U.S.C. 7114(b)(4).

The Labor Statute also makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Labor Statute; "refuse to consult or negotiate in good faith with a labor organization"; or "otherwise fail or refuse to comply with any provision" of the Labor Statute. 5 U.S.C. 7116(a)(1), (5), and (8).

#### B. Proceedings In The Present Case

##### 1. *The Authority's Decisions In The Present Case*

This case concerns two Authority unfair labor practice decisions and orders consolidated for review in the court below. The case arose from requests by unit employees' exclusive representatives to the agency employers under 5 U.S.C. 7114(b)(4) for the employees' names and home addresses (Pet. App. 2a-3a).<sup>1</sup> The facts in both Authority proceedings are virtually identical. The first case (No. 90-4722 before the Fifth Circuit) involved an information request made by the United Food and Commercial Workers Union, Local 1657 (UFCW), which represents a bargaining unit composed of all regular full-

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<sup>1</sup> References to "the agency employers" are to the U.S. Department of Defense, U.S. Department of Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi ("Navy Exchange"), and the U.S. Department of Defense, Army and Air Force Exchange, Dallas, Texas ("AAFES" or "Lowry AF Base"), which were involved in proceedings before the Authority.

time and part-time employees, and all intermittent employees of the Navy Exchange in Gulfport, Mississippi (Pet. App. 2a). Specifically, the UFCW asked for a variety of information, including bargaining unit employee names and home addresses, "for the purpose of starting upcoming negotiations with the [Navy] Exchange as soon as possible" (Jt. App. 60).<sup>2</sup>

The second case (No. 90-4775 before the Fifth Circuit) involved a request made by the American Federation of Government Employees, Local 1345 (AFGE), the union representing a consolidated, worldwide bargaining unit composed of all regular full-time and part-time employees, and all intermittent employees of AAFES which is headquartered in Dallas, Texas and operates a facility at Lowry AF Base in Colorado (Pet. App. 3a). Specifically, AFGE requested unit employees' home addresses, as well as other information about unit employees (Jt. App. 114).

As relevant here, the agency employers denied the unions' requests for employee home addresses, and the unions filed unfair labor practice charges with the Authority (Jt. App. 58, 113). The Authority ordered the disclosure of unit employee names and home addresses (Pet. App. 37a-51a, 52a-64a). The Authority based both of its decisions and orders in this case on its prior decision in *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 F.L.R.A. 515 (1990) (*Portsmouth*), *rev'd sub nom. FLRA v. Department of the Navy, Ports-*

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<sup>2</sup> "Jt. App." references are to the joint appendix in the court below, which was submitted to this Court on April 16, 1993.

*mouth Naval Shipyard, New Hampshire*, 941 F.2d 49 (1st Cir. 1991) (Pet. App. 38a, 53a).

## 2. The Authority's Decisions In Portsmouth and Its Predecessor, Farmers Home Administration

Section 7114(b)(4) of the Labor Statute establishes a broad data disclosure requirement for federal agency employers as part of their bargaining obligation under the Labor Statute. One exception to this requirement, here at issue, is whether disclosure is "prohibited by law." The Privacy Act, 5 U.S.C. 552a (1988), generally bars unconsented disclosure of personal data such as home addresses unless, among other things, release is required under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1988). 5 U.S.C. 552a(b)(2). Exemption 6 of the FOIA (5 U.S.C. 552(b)(6)) in turn allows withholding of personal data contained in personnel files if its release would constitute a "clearly unwarranted invasion of personal privacy." This requires balancing the public interest served by disclosure against the privacy interest preserved by withholding the data. *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

a. The Authority first ordered agency employer disclosure to unions of employee names and home addresses in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 F.L.R.A. 788 (1986) (*Farmers Home Administration*), enforced in part and remanded sub nom. *United States Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), vacated on other grounds and remanded, 488 U.S. 1025 (1989). Consistent with FOIA Exemption 6, the Authority weighed the public interest in improved federal sector labor relations resulting from direct union/employee communications at home against in-

dividual employee privacy, and found the balance favored disclosure. This result was affirmed by numerous courts of appeals.<sup>3</sup>

However, the D.C. Circuit reversed the Authority. *FLRA v. Department of the Treasury, Fin. Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989) (*Dep't of the Treasury*), cert. denied, 493 U.S. 1055 (1990). The D.C. Circuit based its decision on this Court's then-recent decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*). In that case the Court found that the public interest to be weighed, in cases arising under FOIA Exemption 7(C) (5 U.S.C. 552(b)(7)(C)), is whether the data requested sheds light on "what the government is up to." 489 U.S. at 773. The D.C. Circuit held that home addresses do not reveal anything about government activities, and thus found that employee privacy outweighs this public interest in disclosure.

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<sup>3</sup> *United States Dep't of Agric. v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), vacated on other grounds and remanded, 488 U.S. 1025 (1989); *United States Dep't of Navy and Philadelphia Naval Shipyard v. FLRA*, 840 F.2d 1131 (3d Cir.) (*Philadelphia Naval Shipyard*), petition for cert. dismissed, 488 U.S. 881 (1988); *United States Dep't of the Air Force v. FLRA*, 838 F.2d 229 (7th Cir.), petition for cert. dismissed, 488 U.S. 880 (1988); *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987) (*HHS*), petition for cert. dismissed, 488 U.S. 880 (1988).

The Authority's disclosure order in *Farmers Home Administration* resulted from the Second Circuit's reversal of an earlier Authority decision denying a union request for home address disclosure. *American Fed'n of Gov't Employees, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986) (*AFGE, Local 1760*).

b. In its lead *Portsmouth* decision the Authority reaffirmed *Farmers Home Administration* and held that the public interest to weigh under FOIA Exemption 6, in data requests made under the Labor Statute, is facilitation of the federal labor relations scheme. Thus, the Privacy Act does not bar home address disclosure. The Authority recognized in *Portsmouth* that to resolve this disclosure issue, it would be required to rule on the interrelationship of three laws, the Labor Statute, the FOIA, and the Privacy Act, and to harmonize them to the extent possible. 37 F.L.R.A. at 519.

In *Portsmouth* the Authority was mindful of the fact that the home address disclosure issue arises under the Labor Statute, and thus involves predominantly labor relations concerns. 37 F.L.R.A. at 524-25, 537. The Authority focused (37 F.L.R.A. at 528) particularly on the congressionally recognized public interest that underlies Section 7114(b)(4), namely, that an effective federal sector collective bargaining system promotes the public interest. 5 U.S.C. 7101(a). The Authority also detailed a number of specific rights and obligations set out in the Labor Statute, such as the duty of fair representation, which would be facilitated by disclosure of information to unions under Section 7114(b)(4). 37 F.L.R.A. at 527-28. For example, the Authority in *Portsmouth* discussed how home address mailings to employees would increase the ability of unions to fulfill their statutory duty of fair representation to all unit employees, whether or not they were union members, by providing an effective means of communicating with employees about work-related issues. *Id.* Balancing this public interest in disclosure of home addresses against employees' privacy interest, the Au-

thority found it "clear that the public interest served by disclosure far outweighs the privacy interest of individual employees in their . . . home addresses." 37 F.L.R.A. at 535.

Additionally, the Authority found in *Portsmouth* that direct application of *Reporters Committee* would result in treating federal sector unions like any other member of the public requesting FOIA documents. 37 F.L.R.A. at 526. Such a result "would render irrelevant the significant public interest in disclosure" of information to unions under Section 7114(b)(4), and improperly "disregard the interrelation of rights and obligations under the [Labor] Statute." *Id.* The Authority also noted that ordering disclosure was consistent with private sector labor law and did not create an unwarranted disparity between the means available to private and federal sector unions for communicating with bargaining unit employees under the National Labor Relations Act (NLRA), 29 U.S.C. 151-188 (1988 & Supp. II 1990). 37 F.L.R.A. at 526.

The Authority in *Portsmouth* respectfully rejected the D.C. Circuit's holding in *Dep't of the Treasury*, that the Privacy Act barred disclosure. 37 F.L.R.A. at 523. In the Authority's view, *Dep't of the Treasury* was premised on a misapplication of this Court's decision in *Reporters Committee*. 37 F.L.R.A. at 523. The Authority concluded in *Portsmouth* that *Reporters Committee* should be applied to disclosure requests arising directly under the FOIA and not to requests arising under the Labor Statute. 37 F.L.R.A. at 523.

### 3. The Court of Appeals' Decision in the Instant Case

The Fifth Circuit enforced the Authority's name and home address disclosure orders and denied the agencies' petitions for review (Pet. App. 1a-34a). Agreeing that employees' names and home addresses are necessary to the full and proper conduct of collective bargaining, the court focused on whether disclosure of those names and home addresses is "prohibited by law" under Section 7114(b)(4) of the Labor Statute (Pet. App. 9a-26a).

In examining the Privacy Act bar to unconsented disclosure of personal data and its FOIA exception (Pet. App. 10a), the court observed that FOIA "embodies 'a general philosophy of full agency disclosure'" (Pet. App. 11a). However, the court turned its attention to whether the disclosure in this case would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 6 (*id.*).

The court noted that prior to *Reporters Committee* a consensus had existed among the circuit courts of appeals which had considered the issue of whether unions representing federal employees were entitled to obtain the information under the Labor Statute (Pet. App. 11a-12a). In determining whether disclosure was warranted, these courts weighed the public interest in promoting collective bargaining by federal employees against the employees' interest in protecting their names and home addresses from disclosure (Pet. App. 12a). Several of these courts also took notice of the fact that employers in the private sector are required to disclose the same information to employees' exclusive representatives, and found no

apparent reason to treat federal union representatives differently (Pet. App. 13a-14a).<sup>4</sup>

The court below also noted that this Court's decision in *Reporters Committee* resulted in a disappearance of the prior consensus among the circuit courts on the disclosure issue (Pet. App. 15a-16a). In *Reporters Committee*, this Court rejected a disclosure request arising directly under FOIA for an FBI "rap sheet" because disclosure would have constituted an unwarranted invasion of personal privacy under FOIA Exemption 7(C). The Court determined that the disclosure interest must be measured in terms of its relation to FOIA's basic purpose to open agency action to the light of public scrutiny (Pet. App. 17a-18a). Following *Reporters Committee*, a split developed among the courts of appeals on whether the disclosure of unit employees' home addresses to their exclusive representatives was required under the Labor Statute (Pet. App. 16a).<sup>5</sup>

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<sup>4</sup> *Philadelphia Naval Shipyard*, 840 F.2d at 1138; *HHS*, 833 F.2d at 1132 n.4; *AFGE, Local 1760*, 786 F.2d at 557.

<sup>5</sup> Along with the Fifth Circuit, the following circuit courts of appeals agreed with the Authority that providing employees' home addresses to their exclusive representative under Section 7114(b)(4) of the Labor Statute was not prohibited by the Privacy Act. *FLRA v. Department of the Navy, Navy Ships Parts Control Ctr.*, 966 F.2d 747 (3d Cir. 1992) (*en banc*); *FLRA v. U.S. Dep't of the Navy, Navy Resale & Servs. Support Office, Field Support Office, Auburn, Wash.*, 958 F.2d 1490 (9th Cir. 1992) (petition for rehearing and suggestion for rehearing *en banc* stayed); and *FLRA v. Department of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv.*, 954 F.2d 994 (4th Cir. 1992), *vacated and reh'g granted* (Apr. 22, 1992) (stayed before the court *en banc*).

Several other circuits have reversed the Authority on the home address disclosure issue. *FLRA v. United States Dep't*

The Fifth Circuit found that the courts of appeals which had barred disclosure had “read too much into *Reporters Committee*,” and agreed with the circuit courts that held that disclosure was required under the Labor Statute (Pet. App. 18a). The court below gave two reasons. First, the court observed that *Reporters Committee* involved FOIA Exemption 7(C) rather than FOIA Exemption 6 (Pet. App. 19a-20a). In this regard, the court below noted this Court’s recognition that Exemption 7(C), which merely requires that an invasion of privacy be “unwarranted,” should be applied more broadly than Exemption 6, where the standard is a “clearly unwarranted invasion” of privacy. 489 U.S. at 7.

Second, the court below found that “unlike the complainants in *Reporters Committee*, the unions’ disclosure requests in this case do not arise under the FOIA” (Pet. App. 20a). Rather, the court indicated, “their requests originate from within the [Labor Statute] and its Congressionally endorsed framework for protecting and promoting collective bargaining” (*id.*). As a result, the court below held, “*Reporters Committee* has absolutely nothing to say

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*of Defense, Army and Air Force Exch. Serv., Dallas, Tex.*, 984 F.2d 370 (10th Cir. 1993); *FLRA v. U.S. Dep’t of Defense*, 977 F.2d 545 (11th Cir. 1992); *FLRA v. Department of the Navy, Navy Exch., Naval Training Station, Naval Hosp., Great Lakes, Ill.*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of the Navy, Naval Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA v. Department of Veterans Affairs Medical Ctr., Newington, Conn.*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 941 F.2d 49 (1st Cir. 1991); *FLRA v. Department of the Treasury, Fin. Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990).

about the [Labor Statute], or the situation that arises when disclosure is initially required by some statute other than the FOIA, and the FOIA is employed only secondarily” (Pet. App. 20a).

The court below rejected the agency employers’ claim that the plain language of the Labor Statute, Privacy Act, and FOIA requires unaltered application of *Reporters Committee* to the instant case (Pet. App. 22a). In this connection, the court said, “[w]hatever else *Reporters Committee* may have done, it certainly did not amend the language of the [Labor Statute], the Privacy Act, or the FOIA,” which laws invariably had been construed to allow home address disclosure under the Labor Statute prior to *Reporters Committee* (*id.*).

In sum, the court found that *Reporters Committee* “does not require the federal courts, when balancing interests favoring and opposing disclosure, to ignore public interests other than those embodied in the FOIA when the disclosure request originates from some statute other than the FOIA” (Pet. App. 25a). In such a case, the court below stated, “it is proper . . . to consider the public interest embodied in the statute which generates the disclosure request” (Pet. App. 25a-26a). This approach, the court indicated, “fully accords not only with the [Labor Statute]—with its explicit declaration that it seeks to promote collective bargaining and its direction to unions that they represent nonmember employees as faithfully as they do their members—but also fully accords with Congress’s aim in establishing the FOIA—to provide a workable formula ‘which encompasses, balances, and protects all interests’” (Pet. App. 26a). Accordingly, the court ruled that the public interest in

collective bargaining outweighed the employees' privacy interests in nondisclosure of their names and home addresses (*id.*). The court concluded that disclosure would not constitute a clearly unwarranted invasion of privacy, and was thus not prohibited by the Privacy Act. The court therefore granted the Authority's enforcement applications requiring disclosure of the information (*id.*).

Judge Emilio M. Garza filed a dissent, concluding that *Reporters Committee* controlled the disclosure issue (Pet. App. 27a-34a). Although Judge Garza agreed that *Reporters Committee* did not consider the Labor Statute's "explicit policy favoring collective bargaining as in the public interest," he nevertheless found that the language of Section 7114 (b) (4) and *Reporters Committee* made the policy irrelevant (Pet. App. 32a). Further, while Judge Garza agreed with the majority that *Reporters Committee* dealt with Exemption 7(C), not Exemption 6, he did not view such differences as determinative here (Pet. App. 29a-31a).

#### SUMMARY OF ARGUMENT

I. Congress concluded in the Labor Statute that "labor organizations and collective bargaining in the civil service are in the public interest." The Authority correctly identified advancement of this public interest for balancing against individual privacy, in ordering employer agencies to disclose bargaining unit employee home addresses to unions. The unions here requested employee home addresses under Section 7114(b) (4) of the Labor Statute, which governs employer data disclosure obligations. Section 7114 (b) (4) makes general reference to other laws which

may bar disclosure, and this includes the Privacy Act. But the Privacy Act's bar to unconsented disclosure of personal data, and the exception to that bar for disclosure required by the Freedom of Information Act (FOIA), must be construed in harmony with the Labor Statute. The Authority's rulings observe this principle. The agency employers' approach, on the other hand, improperly creates the fiction that the subject data requests were made under the FOIA, thus ignoring the Labor Statute in assessing the public interest in disclosure.

A. The Authority gives effect to Congress's purpose in the Labor Statute of creating an efficient federal sector labor relations system, by ruling for the improved communications resulting from union home address mailings. Unions will be better able to perform their statutory representational duties if they are better informed about employee interests, and employees will be better informed as to the benefits resulting from union representation. It is inconsistent to ignore these Labor Statute considerations when deciding whether agency employers commit unfair labor practices under the very same Labor Statute by withholding employee home addresses.

The Authority also gives effect to congressional purposes in the Privacy Act and FOIA. Congress rejected a proposal that under the Privacy Act all personal data be barred from unconsented disclosure. Rather, it opted for balancing public and privacy interests in disclosing personal data under FOIA Exemption 6. The Authority similarly opted for a balanced approach to disclosure of personal data consistent with Exemption 6.

As to the FOIA, Exemption 6 only specifies that any privacy invasion caused by disclosure of personal

data be “warranted” by furtherance of the public interest. Neither its language nor its legislative history specifies what aspect of the public interest is to be weighed against individual privacy under Exemption 6. Rather, Congress envisioned that the mechanics for Exemption 6 balancing would be fashioned by the courts flexibly, to accommodate all relevant interests, and this is in fact what occurred. The Authority, consistent with Congress’s intent in Exemption 6, opted for a workable formula that considers all relevant interests, by looking to facilitation of the federal sector labor relations system as the public interest to be weighed against individual privacy.

B. The public interest to be considered in disclosure of personal data under FOIA Exemption 7(C), identified by this Court in *Reporters Committee*, i.e., learning “what the government is up to,” is inapplicable to this case. First, the request for data in *Reporters Committee* was made directly under the FOIA, not Section 7114(b)(4) of the Labor Statute. Accordingly, as the court below recognized, that decision did nothing to affect the consensus of the courts of appeals prior to *Reporters Committee*, that the strong public interest in effective federal sector labor relations outweighs the minimal privacy invasion caused by home address disclosure. Moreover, there is a clear practical need to selectively adapt provisions of the FOIA, like Exemption 6, to a data request made under the Labor Statute. No court has suggested that every aspect of the FOIA, including, for example, its jurisdictional and attorney fee provisions, applies to data requests under Section 7114(b)(4). In short, it is mere pretense to

treat a data request under Section 7114(b)(4) as having been made under the FOIA.

*Reporters Committee* is also inappropriately applied here because that case involved FOIA Exemption 7(C), while the instant case concerns Exemption 6. The threshold for withholding data under Exemption 6 is much higher than for Exemption 7(C), thus minimizing the applicability of *Reporters Committee* to this case.

C. The Authority’s rulings also avoid undesirable results that stem from the employers’ insistence on treating this case as if it had arisen under the FOIA. First, lower courts relying on *Reporters Committee* already have begun to sharply curtail the flow of data, such as evaluative and disciplinary records, that unions have long used to perform their representational duties. Second, the employers’ view would create an unnecessary disparity between the communications methods available to federal sector unions and their private sector counterparts, the latter clearly being entitled to receive employee home addresses from employers under the National Labor Relations Act.

II. When the public interest of facilitating federal sector labor relations is weighed against individual privacy, the balance favors disclosure. The improved communications process resulting from home address mailings makes for a more efficient labor relations system, which in turn aids the public interest as identified by Congress in Section 7101(a) of the Labor Statute.

In contrast, the invasion of individual privacy is relatively minimal, as the vast majority of federal courts of appeals have held. Home addresses are

commonly available in telephone directories, voter registration lists, and the like. Moreover, the Authority has identified ways for individual employees to protect their privacy interests, ranging from seeking deletion from union mailings to barring address disclosure if it would cause imminent danger to the employee.

The considerable advancement of the public interest resulting from disclosure, measured against the rather limited privacy invasion suffered, means the employers cannot sustain their burden of showing that disclosure is unwarranted. Accordingly, the judgment of the court below, enforcing the Authority's disclosure orders, should be affirmed.

## ARGUMENT

### **I. THE AUTHORITY CORRECTLY USES FACILITATION OF FEDERAL SECTOR LABOR RELATIONS AS THE PUBLIC INTEREST TO BE BALANCED AGAINST EMPLOYEE PRIVACY INTERESTS WHEN APPLYING FOIA EXEMPTION 6 TO DATA REQUEST CASES ARISING UNDER THE LABOR STATUTE**

This case arises under the Labor Statute. The unions here involved made their home address list requests under Section 7114(b)(4) of that law. The ultimate issue before the Authority and the court below was whether the agency employers' refusals to supply the lists were unfair labor practices under Section 7116(a) of the Labor Statute. The instant case is therefore, first and foremost, a federal sector labor relations case. This fact, we respectfully submit, must be borne in mind when assessing whether the Authority correctly identified facilitation of the

federal sector labor relations process as the public interest to weigh against employee privacy in ordering disclosure of employee home addresses.

Because Section 7114(b)(4) calls for disclosure "to the extent not prohibited by law," it is a general reference law. 2B *Sutherland Statutory Construction* § 51.07 (5th ed. 1992). This general reference brings the Privacy Act into Section 7114(b)(4) analysis. The Privacy Act's bar to unconsented disclosure of personal data would apply here, unless an exception to that general rule applies. 5 U.S.C. 552a(b). One such exception permits unconsented disclosure if required by the FOIA (5 U.S.C. 552). 5 U.S.C. 552a(b)(2). In turn, FOIA Exemption 6, 5 U.S.C. 552(b)(6), allows for withholding of data from release if the public interest in disclosure does not outweigh individual privacy interests. *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

As a general reference law, Section 7114(b)(4) is to be interrelated with the laws referenced, so as to give effect to all laws involved. *Pearce v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 603 F.2d 763, 769-71 (9th Cir. 1979); see also *United States v. Fausto*, 484 U.S. 439, 453 (1988) ("classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute"). The Authority's rulings in this case are true to this basic principle of statutory construction.

As we show below, the Authority applied the Labor Statute, the Privacy Act, and the FOIA so as to give full force and effect to all three laws. This approach

is vastly preferable to the approach of the agency employers in this case and the courts of appeals that have ruled against the Authority, which gives effect only to the FOIA while negating the public interest identified in the Labor Statute. The Authority's construction of these three laws, which includes within the balancing under FOIA Exemption 6 the facilitation of the federal sector labor relations scheme against employee privacy interests, should therefore be adopted by the Court. See, e.g., *FLRA v. United States Dep't of the Navy*, 966 F.2d 747, 757 (3d Cir. 1992) (*en banc*) (*Navy Ships Parts*).

The agency employers' view, that for requests for personal data arising under the Labor Statute we should balance against individual privacy the same public interest identified by this Court in *Reporters Committee* for cases arising under the FOIA, is myopic and should be rejected. Cf. *Dep't of the Treasury*, 884 F.2d at 1461 (R. Ginsburg, J., concurring) ("iron[y]" of construing the Labor Statute to diminish union access to unit employees warrants consideration of whether to qualify application of *Reporters Committee* to the Labor Statute). Further, adoption of the agency employers' view will needlessly cause very undesirable results for federal sector labor relations.

**A. The Authority's Identification In Section 7114(b) (4), Of Facilitating Federal Sector Labor Relations As The Public Interest To Weigh Against Employee Privacy, Gives Full Effect To All Three Laws Here Involved**

1. The Authority's rulings here at issue give effect to Congress's purpose in enacting the Labor Statute. One of the most fundamental policies of the Labor

Statute is the explicit recognition of the link between facilitation of the federal sector collective bargaining process and promotion of the public interest. See, e.g., *Navy Ships Parts*, 966 F.2d at 750; *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d 1129, 1132-34 (4th Cir. 1987) (*HHS*), *petition for cert. dismissed*, 488 U.S. 880 (1988). As Congress stated in Section 7101(a) of the Labor Statute, "the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . safeguards the public interest . . . Therefore, collective bargaining [is] in the public interest."

The agency employers here do not dispute that disclosure of employee names and home addresses is "necessary" for unions to perform their representational responsibilities under the Statute. Every court of appeals to have considered the issue has agreed with the Authority that the communications process created by union home address mailings to employees is categorically more effective than other forms of communications, such as those occurring at the work place.<sup>6</sup> For example, employees are better able in the home to consider union communications free of work

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<sup>6</sup> *FLRA v. United States Dep't of Defense, Army and Air Force Exch. Serv., Dallas, Tex.*, 984 F.2d 370, 373 (10th Cir. 1993); *Navy Ships Parts*, 966 F.2d at 753; *FLRA v. U.S. Dep't of the Navy, Navy Resale & Servs. Support Office, Field Support Office, Auburn, Wash.*, 958 F.2d 1490, 1494 (9th Cir. 1992) (*Navy Resale*) (*petition for rehearing and suggestion for rehearing en banc stayed*); *FLRA v. Department of Veterans Affairs Medical Ctr., Newington, Conn.*, 958 F.2d 503, 507-508 (2d Cir. 1992); *Department of the Treasury*, 884 F.2d at 1449; *United States Dep't of Agric. v. FLRA*,

place pressures, and to provide a more thoughtful response to union questionnaires on potential bargaining subjects. This can play a vital role in formulating union bargaining proposals and representation strategies that are more closely attuned to actual employee interests, and eliminate wasteful union efforts that are not in line with actual employee desires. This in turn helps assure that management representatives will not be wasting their time discussing with the union matters that do not bear on actual employee concerns. The "full and proper discussion, understanding and negotiation" of matters within the scope of collective bargaining, which Congress designed Section 7114(b)(4) to foster, is thus advanced by home address disclosure. Accordingly, there is a clear public interest served by such disclosure because it "contributes to the effective conduct of public business . . . ." 5 U.S.C. 7101(a)(1)(B).

Moreover, the improved union/employee communications derived from home address mailings can help unit employees exercise their rights, under Section 7102 of the Labor Statute, to join or otherwise assist the labor organizations that represent them. More specifically, unions should be able to communicate in the most effective way with employees about grievances, back pay awards, and other rights and benefits. Employees would then be better able to gain awareness of those rights and benefits that are a product of the associational rights conferred under Section 7102 of the Labor Statute.

Finally, enhancing the union's ability to communicate in the most effective manner with its constituent

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836 F.2d 1139 (8th Cir. 1988), vacated on other grounds and remanded, 488 U.S. 1025 (1989); HHS, 833 F.2d at 1131.

employees on representation matters fits neatly in the overall scheme for employee representation devised by Congress in the Labor Statute. As the Authority and various circuit courts of appeals have recognized,<sup>7</sup> Congress has carefully set out in the Labor Statute specific relationships among federal sector unions, bargaining unit employees, and federal agency employers. Significantly in this connection, a federal sector union has a duty of fair representation to "all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. 7114(a)(1); see also *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 531 (1989). A union must discharge this duty despite the fact that bargaining unit employees are not required to become dues-paying members of the union. 5 U.S.C. 7102. It is undisputed here that a union is better able to fulfill this statutory duty if it can avail itself of the improved communications with employees made possible by direct home mailings.

It is senseless to begin statutory analysis with the uniquely interrelating rights and obligations for unions under the Labor Statute, proceed through the Privacy Act and the FOIA, and then return to the Labor Statute for final resolution of the ULP charge with unions stripped of the unique rights and obligations Congress assigned them in the Labor Statute. As the Authority (37 F.L.R.A. at 526-27)<sup>8</sup> and the

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<sup>7</sup> See, e.g., *Navy Ships Parts*, 966 F.2d at 750-51; *Navy Resale*, 958 F.2d at 1495 (9th Cir. 1992).

<sup>8</sup> Because the Authority based its holdings in the instant case almost exclusively on its analysis in *Portsmouth*, 37 F.L.R.A. at 515, references to Authority holdings in this case

court below (Pet. App. 23a) recognized, we should avoid disregarding Congress's intent in enacting the Labor Statute by engaging in the fiction that data requests made under the Labor Statute were actually made under the FOIA. Yet this is just the result the employer agencies here, and some courts of appeals, have endorsed.

Nowhere is the illogic of the agency employers' argument more evident than in their claim (Br. 18) that the Authority errs in supposedly relying on the unions' status as labor organizations in ruling on the subject data requests. According to *Reporters Committee*, 489 U.S. at 771, such reliance is impermissible under Exemption 7(C), in ruling on requests brought directly under the FOIA, because under the FOIA "any person" can make a request for data. While this rule makes perfect sense for data requests made directly under the FOIA, where virtually anyone with a pencil and paper can lawfully request government information, it is woefully inapposite in Labor Statute cases. Under Section 7114(b)(4) of the Labor Statute, only one entity in the world, that is, the certified exclusive representative of bargaining unit employees, has legal standing to make a data request. Moreover, exclusive representatives must satisfy certain requirements for disclosure under Section 7114(b)(4), such as establishing "necess[ity]" for data, that FOIA requesters need not meet. It is thus appropriate that data requests under the Labor Statute will be evaluated taking into ac-

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will, where appropriate, be to *Portsmouth*. This Authority decision, as well as its earlier *Farmers Home Administration* decision, are found in the Joint Appendix for the proceedings in the court below.

count the requester's status as an exclusive representative, because Congress wanted these specific entities to have special rights to data in order to further identifiable representation purposes.<sup>9</sup>

2. The Authority's statutory analysis also gives full effect to the policies and purposes of the Privacy Act. In its deliberations on a bill that eventually became the Privacy Act, Congress rejected a proposal that all personal data be categorically exempt from unconsented disclosure. Instead, Congress adopted what is now Section 552a(b)(2) of the Privacy Act, allowing unconsented disclosure of personal data if required by the FOIA. The purpose of Section 552a(b)(2) was to "preserve the status quo as interpreted by the courts regarding the disclosure of personal information" under the FOIA.<sup>10</sup> 120

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<sup>9</sup> Because of the unique standing of an exclusive representative to request data under Section 7114(b)(4) of the Labor Statute, affirmance of the court below would not serve as precedent for persons making data requests directly under the FOIA itself. Nor does research disclose other disclosure statutes like Section 7114(b)(4), serving public interests different from the FOIA, which would be affected by a ruling favorable to the Authority in this case. Thus, contrary to the agency employers' claim (Br. at 22-23, 25), executive branch agencies will not become "clearing houses" for commercial firms to obtain personal data on federal employees.

<sup>10</sup> At the time the Privacy Act was being considered by Congress, the status quo under the FOIA for name and home address lists allowed for disclosure in certain circumstances. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971). Although *Getman*'s holding was subsequently called into question by *FBI v. Abramson*, 456 U.S. 615, 631 (1982), the fact remains that at the time of passage of the Privacy Act, Congress was aware of home address disclosure under the FOIA. The floor debates on the Privacy Act also show that Congress was

Cong. Rec. 40,406 (1974); see also *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797-98 (3d Cir. 1983); *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 81-83 (D.C. Cir. 1982). Contrary to *amicus* National Right To Work Legal Defense Foundation's claim (Am. Br. 3-7), Section 552a(b)(2) of the Privacy Act shows that Congress intended no greater protection from unconsented disclosure of personal data than was available under Exemption 6 of the FOIA. *Florida Medical Ass'n, Inc. v. Department of Health, Educ., and Welfare*, 479 F. Supp. 1291, 1306 (M.D. Fla. 1979).

The Authority's rulings in these cases are consistent with the purposes of Section 552a(b)(2) of the Privacy Act. In that section Congress took a balanced approach to disclosure of personal data by preserving the disclosure provisions of the FOIA for data such as address lists, over the extreme of banning all disclosure of such data. In the instant case the Authority, consistent with FOIA principles (see pp. 27 to 29, below), also has taken a balanced approach to disclosure of personal data by carefully weighing whether the public interest served by release of the personal data here involved outweighs the individuals' privacy interest in withholding. Its de-

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fully aware, at the time of passage of the Privacy Act, that federal agencies were disclosing home address lists in some circumstances to FOIA requesters. 120 Cong. Rec. 40,883-84 (1974) (remarks of Congressman Moorhead). Finally, soon after passage of the FOIA the Attorney General indicated that individual home addresses may be disclosable under Exemption 6 in certain circumstances. Department of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 37 (1967).

cision, after balancing, to direct disclosure is consistent with Congress's intent in enacting Section 552a(b)(2) of the Privacy Act.

3. The Authority's decisions in this case also give full effect to the principles Congress established in the FOIA. Exemption 6, here at issue, on its face only specifies that an invasion of privacy caused by release of personal data be "warranted" by service of a public interest, to compel disclosure of the data. The plain language of Exemption 6 does not specify what factor is to be weighed against individual privacy, to determine if the invasion of that privacy is "warranted."

The House and Senate reports on the FOIA do not provide any greater specificity concerning the nature of the public interest to be weighed against individual privacy in determining whether the invasion of privacy caused by disclosure is "warranted." The Senate Report, in discussing the meaning of a "clearly unwarranted invasion of personal privacy" under Exemption 6, said only that the phrase "enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The Senate Report also stated, in connection with the disclosure of personal data under the FOIA, that "[s]uccess [in determining whether to disclose such data] lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." *Id.* at 38; see also *Department of Justice v. Landano*, 61 U.S.L.W. 4485, 4489 (U.S.

May 24, 1993), vacating 956 F.2d 422 (3d Cir. 1992) ("particularized approach" to application of FOIA exemptions is consistent with Congress's intent to provide "workable rules" of FOIA disclosure).

The House Report states only that the phrase "clearly unwarranted invasion of personal policy" in FOIA Exemption 6 "provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. 1497, 89th Cong., 2nd Sess. 11 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428.

The language and legislative history of the balancing provision in FOIA Exemption 6 thus demonstrate that Congress did not have in mind a specific public interest that would "warrant" an invasion of personal privacy by disclosure of personal data. Rather, Congress anticipated that the public interest factor to be weighed in Exemption 6 balancing would be developed on a case-by-case basis. See generally, Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 798 (1967).

Indeed, application by the lower courts of the balancing process under FOIA Exemption 6 was marked by varying views of what public interest should be weighed against an invasion of privacy. For example, the D.C. Circuit held that the public interest to be weighed under Exemption 6 was "the public benefit gained from making information freely available." *Board of Trade of the City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 398 (D.C. Cir. 1980). That court did not believe that the public interest under Exemption 6 could be lim-

ited to the FOIA's "core purpose" of monitoring activities of the government. *Ditlow v. Shultz*, 517 F.2d 166, 172 (D.C. Cir. 1975). On the other hand, the Third Circuit considered whether data disclosed would inform the public about the activities of government as the public interest to be weighed under Exemption 6. *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 220 (3d Cir. 1977).

It took this Court's decision in *Reporters Committee*, a case involving FOIA Exemption 7(C), to resolve, for cases arising directly under the FOIA itself, the varying views of the lower courts on identification of the public interest to be balanced under that exemption. In *Reporters Committee* the Court established the monitoring of government activities as the public interest to be considered in cases arising under the FOIA. 489 U.S. at 773.

It is clear from the foregoing that the identification of the public interest to be balanced under FOIA privacy exemptions is a product of judicial augmentation, and not congressional action itself. Under Exemption 6 itself, Congress only wanted to realize a modest measure of some unspecified public benefit resulting from disclosure, to justify an invasion of privacy. Although this Court in *Reporters Committee* has identified the public interest to be balanced in cases arising under the FOIA, it has not done so for cases arising under the Labor Statute. Accordingly, the Authority acted consistently with the concerns of Congress in enacting FOIA Exemption 6 when it looked to the public interest expressly identified by Congress in the Labor Statute, in resolving requests by unions for personal data under Section 7114(b)(4).

**B. The Public Interest In Disclosure Of Personal Data Identified In *Reporters Committee*, Concerning What the Government Is Up To, Is Not Properly Applied To This Case**

The Authority's conclusion (37 F.L.R.A. at 526), affirmed by the court below (Pet. App. 26a) and other courts of appeals,<sup>11</sup> that *Reporters Committee* does not govern requests for personal data under the Labor Statute, is correct for two reasons. First, and most important, the request for data under *Reporters Committee* was made directly under the FOIA itself, while the data requests in the instant case were made under Section 7114(b)(4) of the Labor Statute. Second, FOIA Exemption 7(C) was at issue in *Reporters Committee*, while Exemption 6 is at issue in the instant case.

1. As set forth at p. 7, n.3, above, every court of appeals that considered home address disclosure under the Labor Statute before *Reporters Committee* held that the public interest expressly identified in Section 7101(a) of the Labor Statute, concerning unions and collective bargaining in the federal sector, was properly weighed against employee privacy interests. As the court below noted (Pet. App. 22a), nothing in *Reporters Committee* purported to change the strong public interest Congress recognized in federal sector collective bargaining. Nor did *Reporters Committee* amend the Privacy Act or the FOIA to change the applicability of that public interest to Labor Statute data requests. To the contrary, as the court below noted (Pet. App. 22a), "it can hardly be said that the 'plain language' of [the Privacy Act,

FOIA, and Labor Statute] forbids disclosure, or that to bring into consideration the strong public interest in collective bargaining would require any imaginative reconstruction of those statutes."

Moreover, there is a clear need to adapt provisions of the FOIA, like Exemption 6, to suit the needs of a case arising under another disclosure law such as the Labor Statute, which simply "borrows the FOIA's disclosure calculus for another purpose." Pet. App. 23a. For example, not even the agency employers here would contend that the jurisdictional provision of the FOIA (5 U.S.C. 552(a)(4)(B), requiring original suit in the district courts) applies to data requests by exclusive representatives under Section 7114(b)(4). Nor would they likely argue that a successful requester of data under Section 7114(b)(4) is entitled to attorney fees under the FOIA's fee provision, 5 U.S.C. 552(a)(4)(E). Similarly, the public interest analysis under FOIA Exemption 6 properly contemplates the law under which the case arose, i.e., the Labor Statute.

This Court's identification in *Reporters Committee* of a public interest to be balanced in cases arising under the FOIA does not mean that the Court lacks the flexibility to identify another congressionally recognized public interest to be balanced in Labor Statute cases, while remaining consistent with Congress's purposes in enacting Exemption 6 of the FOIA. Cf. *District of Columbia v. Carter*, 409 U.S. 602, 620-21 (1973) (same word can have different meanings in different parts of same act, to meet purposes of the law, where the subject matter is different); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (same).

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<sup>11</sup> *Navy Ships Parts*, 966 F.2d at 757; *Navy Resale*, 958 F.2d at 1495.

Such flexibility in the application of FOIA Exemption 6 is appropriate here because the FOIA was not designed to further a system of collective bargaining, as is the Labor Statute. These different purposes in the laws under which data requests can arise justify differing applications of the same statutory language in Exemption 6, to give effect to both laws. The Authority (37 F.L.R.A. at 523) and the court below (Pet. App. 24a), consistent with the statutory construction principles discussed at p. 19, above, correctly recognized this fundamental point, and these holdings should be affirmed.<sup>12</sup>

2. As the court below also correctly noted (Pet. App. 19a), *Reporters Committee* is additionally distinguishable because it involved FOIA Exemption 7(C), while the instant case involves Exemption 6. As this Court noted in *Reporters Committee*, 489 U.S. at 756, these FOIA exemptions differ in two significant ways. First, an invasion of personal privacy must be "clearly unwarranted" under Exemption 6, whereas such an invasion need only be "unwarranted" under Exemption 7(C), to justify withholding of personal data. Second, Exemption 6 applies to disclosures which "would constitute" an invasion of pri-

<sup>12</sup> Accordingly, the agency employers' reference (Br. 25) to this Court's observation in *Reporters Committee*, 489 U.S. at 765, that disclosure of personally identifiable data is "not what the framers of the FOIA had in mind," is of no moment to this case. The disclosure policies of the Labor Statute are properly consulted in this case, when it comes to adapting FOIA principles to the present controversy, because the data requests were made under the Labor Statute, and not the FOIA. *Amicus National Right To Work Foundation*'s claim on this point (Am. Br. 7-8) is also without merit for this reason.

vacy, while Exemption 7(C) applies to disclosure which "could reasonably be expected to constitute" such an invasion.

These differences establish that the threshold for withholding information under Exemption 6 is significantly higher than for Exemption 7(C). Accordingly, as this case involves Exemption 6 and not Exemption 7(C), it is appropriate not to apply the holding of *Reporters Committee* here for this reason as well.

**C. The Authority's Identification Of Facilitation Of The Federal Sector Collective Bargaining Process As The Public Interest To Balance Against Employee Privacy Interests Avoids Several Undesirable Results That Arise From Treating This Case As If It Had Arisen Under the FOIA**

The Authority's decisions in this case are not only preferable under principles of statutory construction and unaffected by *Reporters Committee*, but they also avoid some very undesirable results that occur when this case is treated as if it had arisen under the FOIA, as urged by the agency employers (Br. 15-17). As shown below, the Authority's holdings in these cases avoid the sharp reduction in disclosure to unions of personal data of all types that will result from treating these home address cases as if they had arisen under the FOIA. These Authority holdings also avoid creating an unnecessary discrepancy between private and federal sector unions in the means they have available to communicate with bargaining unit members.

1. Federal sector unions, fulfilling their representational responsibilities under the Statute, have long received a wide array of personal data concerning

individual employees.<sup>13</sup> Yet treating the unions in the instant case like any FOIA requester from the public at large, as the agency employers insist on doing (Br. 18), would necessarily jeopardize the ability of unions to obtain this wide array of personal data so vital to their representational functions.

Treating union requests for data implicating personal privacy under Section 7114(b)(4) as if they were made under the FOIA would limit application of the public interest to that identified in *Reporters Committee* for FOIA Exemption 6 balancing. That is, the extent to which documents reveal "what the government is up to" would be balanced against individual privacy interests to determine if the privacy invasion is "clearly unwarranted." *Reporters Committee*, 489 U.S. at 773. Yet some courts of appeals have indicated that personal data such as individual employee evaluations and disciplinary records will normally not tell anything about "what the government is up to." Accordingly, personal data previ-

<sup>13</sup> See, e.g., *American Fed'n of Gov't Employees v. FLRA*, 811 F.2d 769 (2d Cir. 1987) (employee official time and attendance records and progress reviews and performance appraisals); *American Fed'n of Gov't Employees, Local 1345 v. FLRA*, 793 F.2d 1360 (D.C. Cir. 1986) (disciplinary records of unit employees); *Department of the Treasury, Internal Revenue Serv.*, 39 F.L.R.A. 241 (1991) (supervisors' performance standards, objectives, and appraisals); *Internal Revenue Serv., Omaha, Neb.*, 25 F.L.R.A. 181 (1987) (performance appraisal of candidate selected for position); *U.S. Army Corps of Eng'rs, Kansas City Dist., Kansas City, Mo.*, 22 F.L.R.A. 667 (1986) (name and minority status of bargaining unit employees); *Veterans Admin. Regional Office, Denver, Col.*, 7 F.L.R.A. 629 (1982) (names and alphanumerical designations of employees rated by ranking panel for promotion action).

ously ordered released by the Authority and the courts (see note 13, above), will no longer be releasable to unions should the Court adopt the agency employers' scheme for evaluating requests for personal data under the Labor Statute.<sup>14</sup>

The impact of this result on federal sector labor relations is obvious and grave. If unions cannot obtain the data needed to make knowing choices about what grievances to file or what bargaining proposals to advance, one of two undesirable results will frequently occur: unions either will not file meritorious grievances and push worthwhile bargaining proposals, or unmeritorious grievances and bargaining proposals will be pressed, in either case for lack of needed information. The ensuing loss of employee rights and benefits, or waste of time and resources spent on unmeritorious matters, is clearly undesirable and should be avoided.

2. The Authority's disposition of the home address issue also avoids an unnecessary disparity between federal and private sector unions, as to the means they have available to communicate with unit employees. It is clear beyond dispute that private sector

<sup>14</sup> In point of fact this has already begun to occur. In *Dunkelberger v. Department of Justice*, 906 F.2d 779 (D.C. Cir. 1990), the court rejected pursuant to *Reporters Committee* a request made directly under the FOIA for disciplinary records of an FBI agent. In *FLRA v. Department of Commerce*, 962 F.2d 1055 (D.C. Cir. 1992), that court held, based on *Reporters Committee* and *Dunkelberger*, that a union was not entitled, under Section 7114(b)(4), to data concerning individual employee awards based on superior performance. In both cases the failure of the requested data to shed light on how the government operates was a basis for the court's rejection of the data request.

exclusive representatives are entitled to receive unit employee home address lists from employers under the National Labor Relations Act (NLRA), 29 U.S.C. 151-188 (1988 & Supp. II 1990). *NLRB v. Associated Gen. Contractors*, 633 F.2d 766, 773 (9th Cir. 1980), cert. denied, 452 U.S. 915 (1981); *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1113 (1st Cir. 1975); *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1204 (2d Cir. 1970) (*United Aircraft*), cert. denied, 401 U.S. 993 (1971); *Star Tribune*, 295 N.L.R.B. 543, 565 (1989); *Massillon Community Hosp.*, 282 N.L.R.B. 675, 682 (1987) (*Massillon Hosp.*); *Georgetown Holiday Inn*, 235 N.L.R.B. 485, 486 (1978).<sup>15</sup> Both the courts and the National Labor Relations Board have recognized that employee home address lists can enable unions to better perform their representational responsibilities. See, e.g., *United Aircraft*, 434 F.2d at 1206; and *Massillon Hosp.*, 282 N.L.R.B. at 682.<sup>16</sup>

<sup>15</sup> Moreover, this Court has held that an employer must provide candidate unions in an election campaign with the names and home addresses of bargaining unit employees. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (*Wyman-Gordon*). In that case the Court endorsed the National Labor Relations Board's decision in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966) (*Excelsior*), requiring such disclosure because union home address mailings ensured a more effective form of communication than work place contacts.

<sup>16</sup> Several state courts have also ruled that unions representing state and local government employees are entitled to employee home addresses. See, e.g., *International Plant Guard Workers of Amer. v. Department of State Police*, 373 N.W.2d 713 (Mich. 1985); *Pottle v. School Comm. of Braintree*, 482 N.E.2d 813 (Mass. 1985); *Browning v. Walton*, 351 So. 2d 380 (Fla. Ct. App. 1977).

Although the Labor Statute and the NLRA are not to be read *in pari materia* for all purposes,<sup>17</sup> private sector case law generally provides strong guidance in parallel public sector matters. *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987); *Library of Congress v. FLRA*, 699 F.2d 1280, 1286-87 (D.C. Cir. 1983); see also 5 U.S.C. 7101(a)(1) ("experience in both private and public sector employment" indicates that employee organizations and collective bargaining in the federal government "safeguards the public interest"). As this Court has noted, the Labor Statute and the Authority were patterned after the NLRA and the Board. *Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983).

In the instant case, no good policy reason appears for distinguishing between federal and private sector unions, as to the available methods of communication with unit employees. The benefits of enabling federal sector unions to communicate in an effective manner with their constituent employees (see pp. 21 to 23, above) are as great as for private sector unions.

The agency employers' claim (Br. 28), that due to their coverage under the Privacy Act federal employees have greater expectations of privacy than do private sector employees, begs the question. As shown above at p. 25, the Privacy Act is not a complete bar to disclosure of all personal data about individuals. Rather, that Act entitles individuals to no greater protection from unauthorized disclosure of personal data than is afforded under FOIA Exemption 6. And in the particulars of this case, FOIA Exemption 6 is

<sup>17</sup> *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 648 (1990).

not properly construed as allowing for withholding the home addresses here at issue (see p. 27, above).

Additionally, the differences in privacy protection between private and federal sector employees are not as significant as the agency employers claim (Br. 27-28). Private sector employees do in fact have privacy rights to be protected in data disclosures to unions under the NLRA. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (personally sensitive data, such as aptitude test results, not required to be disclosed to union). Thus, the Privacy Act is not properly interpreted to provide for significantly greater privacy protections for federal employees than the protection case law under the NLRA affords private sector employees. Indeed, federal employees have even less reason to expect a privacy interest as to work-related personal information than do private employees because intimate details concerning employment are required by regulation to be made public. 5 C.F.R. 293.311 (1992) (a federal employee's pay grade, salary, and job responsibilities, among other things, are available to the public); see also *FLRA v. Department of the Treasury*, 884 F.2d 1446, 1460 (D.C. Cir. 1989) (R. Ginsburg, J., concurring), *cert. denied*, 493 U.S. 1055 (1990). We submit that this work related information is even more intimate than an employee's home address.

In sum, the Authority's resolution of these cases, as affirmed by the court below, gives full effect to not just one but all three of the laws at issue here, is not governed by this Court's *Reporters Committee* decision, and avoids some very undesirable results that would occur if this case is treated as if it had arisen under the FOIA as the agency employers urge. For these reasons, the Authority's reliance on facili-

tation of federal sector labor relations as the public interest to be weighed against employee privacy, in FOIA Exemption 6 balancing, should be affirmed. Trina Jones, Note, *Collective Bargaining in the Federal Public Sector: Disclosing Employee Names and Addresses Under Exemption 6 of the Freedom of Information Act*, 89 Mich. L. Rev. 980 (1991) (approving the Authority's use of the Labor Statute's public interest in balancing against employee privacy, and directing disclosure).

## II. FACILITATION OF FEDERAL SECTOR LABOR RELATIONS CAUSED BY HOME ADDRESS RELEASE OUTWEIGHS ANY RESULTING INVASION OF PERSONAL PRIVACY, AND RELEASE IS THEREFORE NOT BARRED BY FOIA EXEMPTION 6

Having identified the correct public interest to weigh against employee privacy interests in withholding home addresses under FOIA Exemption 6, it is clear that the public interest served by disclosure outweighs the invasion of privacy caused by release. Accordingly, as each court of appeals that has adopted this public interest for balancing purposes has held,<sup>18</sup> FOIA Exemption 6 does not bar home address disclosure under the Labor Statute.

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<sup>18</sup> *Navy Ships Parts*, 966 F.2d 747; *Navy Resale*, 958 F.2d 1490; *United States Dep't of Agric. v. FLRA*, 836 F.2d 1139 (8th Cir. 1988) (*Dep't of Agriculture*), *vacated on other grounds and remanded*, 488 U.S. 1025 (1989); *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), *petition for cert. dismissed*, 488 U.S. 880 (1988); *American Fed'n of Gov't Employees, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986).

**A. Home Address Disclosure Serves The Public Interest By Facilitating Federal Sector Labor Relations**

As discussed at pp. 21 to 23, above, the form of union/employee communication resulting from home address mailings is superior to alternative forms of communication focused on the work place. As the Authority held in *Portsmouth* (37 F.L.R.A. at 531), home mailings are exclusively under the union's control, and employees are free to consider a union's mailing without any of the restraints that may be perceived at the work place. At home an employee "has the leisure and the privacy to give the full and thoughtful attention to the union's message that the workplace generally does not permit." *Portsmouth*, 37 F.L.R.A. at 532.

This most effective form of union communication with employees aids the labor relations system established by Congress in the Labor Statute in several ways, as previously indicated. For example, unions would be better able to formulate bargaining demands more attuned to real employee interests; employees would have a better way to learn of their entitlement to benefits achieved by their union on their behalf; and the union would have the best means available to ensure that it is able to fulfill its duty of fair representation to all unit employees. These obvious enhancements for the labor relations system embodied in the Labor Statute constitute a very substantial public interest served by disclosure.

The agency employers' claim (Br. 28-29), that a union can obtain employee home addresses at the work place, does not detract from the public interest served by disclosure. First, as indicated at p. 21, above, every court to have addressed the issue has

rejected this sort of argument and agreed with the Authority that employer home address disclosure is "necessary" for effective labor relations under Section 7114(b)(4). Second, in *Excelsior*, 156 N.L.R.B. at 1241-44, the NLRB rejected this idea as unreliable for ensuring effective union/employee communications in the analogous union election campaign setting. In *Wyman-Gordon*, 394 U.S. at 767, this Court endorsed the Board's conclusion on this point. The same result should be reached here.

**B. Employees Experience Only A Minimal Invasion Of Personal Privacy As A Result Of Home Address Disclosure To Their Unions**

Although the Authority has recognized (*Portsmouth*, 37 F.L.R.A. at 532) that employees have some privacy interest in their home addresses, it has, consistent with the view of the overwhelming majority of appeals courts to decide the issue,<sup>19</sup> correctly characterized that interest as minimal. This conclusion is correct as to both the anonymity and solitude dimensions to individual privacy. Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 433 (1980)

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<sup>19</sup> *Navy Ships Parts*, 966 F.2d at 759 ("minimal"); *Navy Resale*, 958 F.2d at 1496 ("minimal"); *FLRA v. Department of the Navy, Portsmouth Naval Shipyard*, 941 F.2d 49, 56 (1st Cir. 1991) ("modest"); *United States Dep't of the Air Force v. FLRA*, 838 F.2d 229, 232 (7th Cir.), *petition for cert. dismissed*, 488 U.S. 880 (1988) ("minuscule"); *Dep't of Agriculture*, 836 F.2d at 1143 ("not particularly compelling" privacy interest); *American Fed'n of Gov't Employees, Local 1760 v. FLRA*, 786 F.2d 554, 556 (2d Cir. 1986) ("modest"); *Ditlow v. Schultz*, 517 F.2d 166, 170 (D.C. Cir. 1975) ("less than a substantial invasion of privacy").

(there are three independent elements to privacy: secrecy, anonymity, and solitude).

A person's home address is generally one of the least private facts concerning an individual, frequently appearing in telephone directories, voter registration lists, and the like. See, e.g., *American Fed'n of Gov't Employees, Local 1760 v. FLRA*, 786 F.2d 554, 556 (2d Cir. 1986). Moreover, the context of the list itself reveals nothing personal about an employee other than the fact of his/her federal employment. Compare, e.g., *Multnomah County Medical Society v. Scott*, 825 F.2d 1410 (9th Cir. 1987) (individual's appearance on a list of Medicare recipients reveals information about age and health). Accordingly, an employee's interest in secrecy and anonymity is only minimally affected by home address release to unions.

Nor can it be said that release will lead to a significant intrusion on employee solitude. As the Authority pointed out in *Farmers Home Administration*, 23 F.L.R.A. at 793, the simple expedient of discarding unwanted communications can minimize the perceived invasiveness of unwanted mailings. Almost 60 percent of the mail received by the average American household in 1991 (about 20 pieces a week) was advertising material, and some 54 percent of households indicated they either did not mind this advertising mail or wanted more of it. Demand Research Division, United States Postal Service, *The Household Diary Study, Fiscal Year 1991*, Vol. I, pp. I-2, I-3 (1992). Thus, most employees already receive in their homes every day a very substantial flow of unsolicited mail that might be expected to be more unwelcome than communications from their exclusive

bargaining agent. The occasional union questionnaire or notice concerning "bread-and-butter" employment matters, which would likely be of more immediate concern to an employee than, say, the latest department store catalogue, could scarcely be said to increase an employee's sense of intrusion by mail.<sup>20</sup>

The minimal privacy interest that individual employees have in their home addresses is in any event protected by the Authority from any potential harassment that may result from release. In *Portsmouth*, 37 F.L.R.A. at 533, the Authority reaffirmed its earlier holding in *Farmers Home Administration*, 23 F.L.R.A. at 798, that employees who can show a realistic threat of danger if their home addresses are released will be able to have their names and addresses omitted from the list released to the union.<sup>21</sup>

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<sup>20</sup> The agency employers' reliance (Br. 20) on *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), for the proposition that a person's home is his/her castle, avails them nothing. For whatever may be the intrusive impact of receiving pornographic material in the mail, as was at issue in *Rowan*, union mailings as to employment conditions can hardly be put on the same scale of invasiveness. As the Postal Service statistics set forth above in the text show, most personal residences do not view run-of-the-mill unsolicited mailings as invasive at all.

<sup>21</sup> In *Farmers Home Administration* the Authority relied on *Shell Oil Co. v. NLRB*, 457 F.2d 615 (9th Cir. 1972). In that case the court found an employer did not commit unfair labor practices by refusing to provide a union with the names and home addresses of all unit employees, where several months prior to the request many employees engaged in a violent strike and harassed at their homes those employees who returned to work.

The agency employers' claim (Br. 21-22), that the Authority has not adequately protected employees from potential harassment, is baseless. For example, in *Department of the Navy, U.S. Naval Ordnance Station*, 33 F.L.R.A. 3 (1988); and *Veterans Admin., Riverside Nat'l Cemetery, Riverside, Cal.*, 33 F.L.R.A. 316 (1988), the Authority considered on the merits and found wanting claims that employees had legitimate concerns of imminent danger if their home addresses were released.<sup>22</sup> However, the fact that no employee in those cases was able to adduce credible evidence of imminent danger as a result of home address release does not mean that the Authority is unmindful of legitimate harassment claims.

Moreover, the Authority indicated in *Farmers Home Administration*, 23 F.L.R.A. at 793, that employees not wishing to receive union communications at home can either request that they be taken off the union's mailing list, or discard the unwanted communication. See, e.g., *Navy Ships Parts*, 966 F.2d at 759. Presumably, any union wanting to maintain employee support to remain the exclusive bargaining agent would honor such employee requests. Cf. *Excelsior*, 156 N.L.R.B. at 1244 (union seeking em-

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<sup>22</sup> In *Department of the Navy*, 33 F.L.R.A. at 5, one employee affidavit indicated only that three years prior to the union's request a union member had threatened the affiant's life at the latter's home. A second affidavit indicated only that the employee "would not feel comfortable" if the union had the employee's home address. In *Veterans Admin.*, 33 F.L.R.A. at 317, the record reflected only that a number of unit employees did not wish to have their home addresses released.

ployee votes in election campaign will not likely harass employees at home).<sup>23</sup>

**C. Balancing The Labor Relations Public Interest Served By Disclosure Against The Privacy Interest Invasion Strongly Favors Disclosure**

The strong public interest under the Labor Statute in home address disclosure greatly outweighs the minimal invasion of personal privacy resulting from that disclosure. Unions will be able to categorically improve their ability to execute their representational responsibilities as a result of improved union/employee communications. This heightened union effectiveness enhances the overall effectiveness of the labor relations process in the federal sector, and this in turn effectuates the public interest as identified in Section 7101(a)(1) of the Labor Statute.

This substantial public interest served by disclosure clearly shows that the agency employers cannot sustain their burden of showing that the minimal privacy invasion resulting from disclosure is "clearly unwarranted" under FOIA Exemption 6. *EPA v. Mink*, 410 U.S. 73, 79 (1973). Thus, as the Authority held (37 F.L.R.A. at 531), when using the public interest in disclosure identified in the Labor Statute,

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<sup>23</sup> Further, any employee aggrieved by union misuse of the mailing lists may have more direct recourse against the union. Gerald M. Griffith, Comment, *The Union's Right to Information at the Expense of Employees' Privacy Rights*, 15 U. Tol. L. Rev. 755, 804 (Winter 1984) (tort privacy or duty of fair representation actions may be available to employees claiming misuse of information).

FOIA Exemption 6 does not bar release of employee names and home addresses.<sup>24</sup>

In closing, an appropriate resolution of this case was foretold in the Fourth Circuit's case law on this issue. In *American Federation of Government Employees, Local 1923 v. United States Department of Health and Human Services*, 712 F.2d 931 (4th Cir. 1983), that court, balancing a public interest consistent with *Reporters Committee*, rejected a request for employee home addresses made by a federal sector union directly under the FOIA.

In a later case where the same data was requested under the Labor Statute, the Fourth Circuit distinguished its earlier decision on the ground that the request in that case arose directly under the FOIA. *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), *petition for cert. dismissed*, 488 U.S. 880 (1988). Thereafter a

<sup>24</sup> Contrary to the agency employers' claim (Br. 19-20) and the ruling of the court below (Pet. App. 19a), disclosure is warranted even using the extent to which data shows "what the government is up to" as the public interest to weigh against individual privacy. Employee home addresses will enable any person interested in learning about operation of the subject agencies to question employees at home and obtain more candid information about agency operations than if the employee were contacted at work. For example, contacting employees at home would facilitate the polling of employees regarding whistleblower protections, safety and hazard reporting, disciplinary standards and other issues vital to the integrity and honesty of government. Such "derivative use" for data, in learning about the activities of government agencies, was expressly left open for FOIA Exemption 6 balancing in *United States Department of State v. Ray*, 112 S. Ct. 541 (1991). When weighed against the minimal privacy interest involved, the balance again favors disclosure.

panel of the Fourth Circuit was asked to reconsider its position in light of this Court's decision in *Reporters Committee*. *FLRA v. Department of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv.*, 954 F.2d 994 (4th Cir. 1992), *vacated and reh'g granted* (Apr. 22, 1992) (stayed before the court *en banc*). The panel reaffirmed its view that home address requests under the Labor Statute should be analyzed differently than requests made directly under the FOIA. The court of appeals balanced the public interest in an efficient federal sector labor relations system against employee privacy, and held the balance there favored disclosure. In brief, the *Reporters Committee* decision did not affect the panel's earlier analysis. Thus, the Fourth Circuit has already recognized the same distinction we ask this Court to recognize in the instant case: the law under which the case arises is determinative of the public interest to be weighed in assessing whether disclosure is warranted under FOIA Exemption 6.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, AS AMENDED, 5 U.S.C. §§ 7101-7135 (1988); AND RELEVANT PORTIONS OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. 552 (1988); AND THE PRIVACY ACT, 5 U.S.C. 552a (1988)

5 U.S.C. § 7101 provides:

**“§ 7101. Findings and purpose**

“(a) The Congress finds that—

“(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

“(A) safeguards the public interest,

“(B) contributes to the effective conduct of public business, and

“(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

“(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(1a)

“(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

\* \* \* \* \*

5 U.S.C. 7102 provides:

**“§ 7102. Employees’ rights**

“Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

“(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

“(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

\* \* \* \* \*

5 U.S.C. 7114(a)-(b) provides:

**“§ 7114. Representation rights and duties**

“(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

\* \* \* \* \*

“(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

\* \* \* \* \*

“(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

“(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

“(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

“(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

“(A) which is normally maintained by the agency in the regular course of business;

“(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

“(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

\* \* \* \* \*

5 U.S.C. 7116(a) provides:

**“§ 7116. Unfair labor practices**

“(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

“(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

\* \* \* \* \*

“(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

\* \* \* \* \*

“(8) to otherwise fail or to comply with any provision of this chapter.

\* \* \* \* \*

5 U.S.C. 552(b) provides:

**§ 552. Public information; agency rules, opinions, orders, records, and proceedings**

\* \* \* \* \*

(b) This section does not apply to matters that are—

\* \* \* \* \*

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be

expected to endanger the life or physical safety of any individual;

\* \* \* \* \*

#### § 552a. Records maintained on individuals

\* \* \* \* \*

(b) **Conditions of disclosure.**—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

\* \* \* \* \*

(2) required under section 552 of this title;

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

Supreme Court, U.S.

FILED

JUL 2 1993

**U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF  
NAVY, NAVY CBG EXCHANGE, CONSTRO~~DEFINITION OF BAG~~ CLERK  
TALION CENTER, GULFPORT, MISSISSIPPI, and the  
U.S. DEPARTMENT OF DEFENSE, ARMY AND AIR  
FORCE EXCHANGE, DALLAS, TEXAS,**

*Petitioners.*

v.

**FEDERAL LABOR RELATIONS AUTHORITY and  
AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO,**

*Respondents.*

**On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

**BRIEF FOR RESPONDENT AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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No. 92-1223

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U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF  
NAVY, NAVY CBG EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, and the  
U.S. DEPARTMENT OF DEFENSE, ARMY AND AIR  
FORCE EXCHANGE, DALLAS, TEXAS,

*Petitioners,*

v.

FEDERAL LABOR RELATIONS AUTHORITY and  
AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO,

*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

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**BRIEF FOR RESPONDENT AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES, AFL-CIO**

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The opinions below, the basis of this Court's jurisdiction, the statutes involved and a full statement of the case are set out at pp. 1-14 & 1a-6a of the brief for respondent Federal Labor Relations Authority and, in the interest of avoiding needless duplication, are incorporated by reference—rather than restated—in this brief.

**SUMMARY OF ARGUMENT**

The issue presented in this case—which arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (“Federal Labor Statute”)—is whether the most basic policies of that Act should

play any role in a major area of its administration, *viz.*, in determining whether a union acting as the exclusive collective bargaining representative of federal sector employees—having been selected by those employees through the secret ballot electoral processes provided by federal law—is entitled to the disclosure of personnel records of bargaining unit employees when such disclosure is “necessary for the full and proper” performance of that representative’s collective bargaining functions. 5 U.S.C. § 7114(b)(4).

Petitioners’ contention is that—because of the interpretation given to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 522, in *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989), and because of the interplay of the Federal Labor Statute, the Privacy Act, 5 U.S.C. § 552a, and the FOIA—this issue must be resolved without any consideration being given to the weighty Federal Labor Statute concerns at stake. On that approach, privacy interests of federal employees must *always* outweigh the interests of federal sector unions in acquiring such information, even though the intersection of the Privacy Act and FOIA creates a limitation only on disclosures that would constitute “clearly unwarranted invasions of personal privacy.” 5 U.S.C. § 552(b)(6).

Petitioners’ position is not justified by the language, structure, or background of the relevant legislative materials, nor by the *Reporters Committee* decision. That position is at war with the Federal Labor Statute’s statement of the strong public interest in an effective federal sector collective bargaining system and with the conception of effective collective bargaining—drawn from the National Labor Relations Act—that Congress intended to embody in the Labor Statute. See 5 U.S.C. § 7101(a); *see also* pp. 4-6 & 11-12, *infra*. Indeed, every court that has examined the information request at issue here—seeking the mailing addresses of bargaining unit members—has found that disclosure would represent a relatively

minor intrusion into personal privacy interests, while non-disclosure would substantially undermine the effectiveness of the federal collective bargaining system. *See* pp. 8-13, *infra*.

The *Reporters Committee* decision—upon which petitioners principally rely—does not support the extreme proposition that the petitioners advocate, *viz.*, that in the context of a disclosure request arising from a statute other than FOIA, where FOIA becomes relevant because of cross-references in other statutes that incorporate FOIA’s terms, the public interests articulated in the statute under which the information request arose may not be considered in applying the balancing tests set out in FOIA. *See* pp. 14-19, *infra*. Indeed, the text of FOIA—and this Court’s *Reporters Committee* test for determining “unwarranted” invasions of privacy—is fully compatible with incorporating into the FOIA analysis the public interests articulated in the Federal Labor Statute. *See* pp. 16-21, *infra*.

The language in *Reporters Committee*—which petitioners seek to take out of context—focuses on the situation in which a plaintiff who seeks information both relies on FOIA *standing alone* for his right to the information and attempts to rely on public interests *not articulated in FOIA* to support his claim. In this case—unlike *Reporters Committee*—the union is not asking this Court to assess vague “public policies” that are articulated in no relevant congressional enactment. *See* pp. 18-19, *infra*. Rather, the issue here is whether policies clearly and strongly articulated by Congress in the statute on which the union bases its claim should be given effect. *See* pp. 19-21, *infra*.

Recognizing the incongruity of asking this Court to hold that Congress intended the Federal Labor Statute to be interpreted in a manner that would seriously hinder effective collective bargaining, petitioners offer that, under their construction of the statutes in question, some necessary personnel information can still be made available under Privacy Act “routine use” regulations. *See*

pp. 21-22, *infra*. But what petitioners “reassurance” in this regard shows is that agency managements are *not* in fact “prohibited by law” from furnishing the information at issue; but rather, have arrogated to their discretion the judgments on Federal Labor Statute disclosure that Congress intended to be made by the FLRA, an independent and expert agency. *See* pp. 22-25, *infra*.

#### ARGUMENT

1. This is an unfair labor practices case that arises under, and has been prosecuted through the processes provided by, the Federal Labor Statute. The issue presented turns on the nature and dimension of the Federal Labor Statute right of a union—once it has been elected as the exclusive bargaining representative of an appropriate bargaining unit of employees of a federal agency, through the secret ballot electoral processes provided by federal law—to secure from the agency “reasonably available” personnel information that is “necessary for the full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining,” and on the corresponding Federal Labor Statute obligation of the federal agency to provide that information on the union’s request. *See* 5 U.S.C. § 7114(b)(4).

Despite all that being so, the parties all agree that the case turns on the proper method of interpreting Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6), and, even more particularly, the phrase “clearly unwarranted invasion of personal privacy” contained therein. Indeed, the crux of the disagreement here is the proper method of reading this Court’s decision in *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989), which construed FOIA Exemption 7(C) and its phrase “unwarranted invasion of personal privacy.” In this regard, the petitioner federal agencies argue here that *Reporters Committee* governs the instant case and dictates that this case be decided *as if it were* a FOIA case and without any regard to the fact that *it is instead* a Federal Labor Statute case.

Given how far afield we have come, it facilitates analysis to begin by outlining the series of statutory cross-references that have brought us to this point.

2. The Federal Labor Statute rests on Congress’ conclusion that “labor organizations and collective bargaining in the civil service are in the public interest.” 5 U.S.C. § 7101(a).<sup>1</sup> Based on this conclusion, Congress enacted a “scheme governing labor relations between federal agencies and their employees” that, as this Court has explained, “significantly strengthened the position of public employee unions while carefully preserving the ability of federal managers to maintain ‘an effective and efficient Government.’” *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92 (1983) (quoting 5 U.S.C. § 7101(b)).

Congress, in order to ensure that federal agencies would act in conformity with its judgment that collective bargaining serves the public interest, imposed on each agency “a duty to bargain collectively [and] in good faith” with the labor organization that has been selected through the statutory election processes as the exclusive representative of an agency’s employees. 464 U.S. at 92 (citing

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<sup>1</sup> As Congress fully set forth in the statutory text:

The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,  
 (B) contributes to the effective conduct of public business, and  
 (C) facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment.

\* \* \* \*

Therefore, labor organizations and collective bargaining in the civil service are in the public interest. [5 U.S.C. § 7101(a)]

5 U.S.C. § 7116(a)(5)). In order to ensure that the collective bargaining system would operate effectively and efficiently Congress further specified that agencies must furnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law*, data . . . which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. [5 U.S.C. § 7114(b)(4).]

It is this provision—and, in particular, its cross-reference to, and its exclusion of, disclosures of data “prohibited by law”—that generates this litigation.

Given the nature of our government, there are scores of laws that prohibit the disclosure of government data. The pertinent law here is the Privacy Act, 5 U.S.C. § 552a. In general terms, that Act provides:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. . . . [5 U.S.C. § 552a(b).]<sup>2</sup>

Given its potential scope, the Privacy Act tempers that prohibition through 12 exemptions. One such exemption covers situations where “disclosure of the record would be . . . required under section 552 of this title [the Freedom of Information Act].” *Id.* § 552a(b)(2).

The FOIA, in its turn, while broadly mandating disclosure of public records, tempers that provision with 9 exemptions. And, as already noted, Exemption 6 permits

<sup>2</sup> The Privacy Act defines the word “record” to include “any item, collection, or grouping of information about an individual that is maintained by an agency.” 5 U.S.C. § 552a(a)(4). The Act defines “system of records” as “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual.” *Id.* § 552a(a)(5).

nondisclosure of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

In sum, the path that must be followed here goes (1) from the Federal Labor Statute’s general command that each agency must disclose relevant collective bargaining information to an exclusive representative, subject to the limitation that no such disclosure is required if prohibited by law, (2) to the Privacy Act’s general command that there be virtually no disclosures of personally identifiable records, subject to a limitation for information disclosable under the FOIA, (3) to the FOIA’s general command that virtually all records be disclosed, subject to the limitation in FOIA Exemption 6 for disclosures of personnel records that “would constitute a clearly unwarranted invasion of personal privacy.” And the ultimate point of the quest is to determine whether the *Federal Labor Statute* mandates the disclosure to an exclusive bargaining representative, by a federal agency, of such basic information as the names and addresses of the employees in the bargaining unit that the exclusive representative represents.

3. Given the complexity of this decisional tree, it is important to cut away as much of the underbrush as is possible as quickly as possible.

Since the Federal Labor Statute’s disclosure duty is limited by the phrase “to the extent not prohibited by law,” all agree that the Federal Labor Relations Authority must, in applying § 7114(b)(4), examine laws other than the Labor Statute.

Similarly, all agree that where another statute prohibits disclosure of information by an agency in *unequivocal terms*, the Federal Labor Statute contemplates non-disclosure.<sup>3</sup>

<sup>3</sup> See, e.g., Fed. R. Crim. P. 6(e) (secrecy of grand jury records); 13 U.S.C. §§ 8(b), 9(a) (secrecy of information furnished for census purposes); 42 U.S.C. §§ 2165, 2167, 2168 (secrecy of atomic energy information).

The dispute in this case is over the question of whether the Federal Labor Statute allows the FLRA, when the other federal statute at issue *conditions* its nondisclosure policy on the *balancing of competing interests*, to include in the balance the congressionally declared public interest in effective collective bargaining. The FLRA has answered this question "yes"; petitioners would have it answered "no."

It is of equal importance to emphasize the significance of how this question is answered. Given the breadth of the Privacy Act, if petitioners are right, a union serving as federal employees' exclusive representative, has virtually no right of access to information from the personnel records of those the union represents, regardless of how crucial the records might be to the union's roles as the employees' representative in collective bargaining, in investigating grievances, or in presenting arbitrations. Under such a regime, the ability of the union to effectively perform its functions as exclusive representative—and the ability of the federal labor relations system to provide for effective collective bargaining—would be greatly diminished.<sup>4</sup>

4. Having said that much, it is time to return to the starting point—the Federal Labor Statute. When we do so, we see that, *in terms of the collective bargaining system* contemplated by the Labor Statute, a federal agency's disclosure to a union of the home addresses of the employees the union represents would *not* (in the words of the relevant FOIA provision) "constitute a clearly unwarranted invasion of personal privacy."

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<sup>4</sup> Petitioners have urged that, in the case of some agencies, unions could, under certain circumstances, obtain such personnel records under the agency regulations implementing the Privacy Act's "routine use" exception, 5 U.S.C. § 552a(b)(3). The inadequacy of petitioners' response in this regard is discussed at pages 21-25, *infra*.

*First*, the Federal Labor Statute establishes a strong public policy of promoting an efficient and effective system of federal sector collective bargaining. 5 U.S.C. § 7101(a). It is clear that this public policy is served by information disclosures that allow for direct communication between an exclusive representative and *all* the members of the bargaining unit whom it represents—whenever the union may see the need for such communication, in confidence, and in an atmosphere free of employer influence or (real or perceived) employer surveillance.

Such communication is essential so that an exclusive representative can, *e.g.*, account for the actual needs and honest desires of all those in its unit as it formulates its agenda; explain its role in the system of collective bargaining to the bargaining unit membership; monitor the workplace by enlisting the assistance of those it represents; and gather witnesses as part of its investigation and presentation of grievances. Access to employee names and addresses—which allows unions to communicate with unit members through mailings to their homes, rather than through contacts at the employer-dominated workplace—is essential to a union's ability to engage in such free, independent, and unobserved communication with the bargaining unit. As the FLRA concluded,

[T]he communication between unit employees and their exclusive representative which would be facilitated by release of names and home addresses . . . is fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency. When using direct mailings, the content, timing and frequency of the communication is completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time con-

straints inherent in their work environments, and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present. [*Farmers Home Administration*, 23 FLRA 788, 796-797 (1986) (quoted in *U.S. Department of Defense v. FLRA*, 975 F.2d 1105, 1108 (5th Cir. 1992) (reprinted at Pet. App. 6a)).]<sup>5</sup>

The public interest in facilitating such communication is heightened further by the fact that, under the Federal Labor Statute, the labor organization is the *exclusive* representative of the bargaining unit, so that employees may be particularly disadvantaged if their union cannot reach them to solicit their views and obtain their guidance on basic labor relations issues. The Federal Labor Statute, moreover, mandates that labor organizations acting as exclusive representatives *must* "represent[] the interests of *all* employees in the [bargaining] unit . . . without discrimination and without regard to labor organization membership," 5 U.S.C. § 7114(a)(1) (emphasis added), a mandate that presupposes a union's ability to ascertain and account for the views and interests of *all* bargaining unit employees.<sup>6</sup>

<sup>5</sup> The need for unions to be able to communicate with bargaining unit members through the mails is, of course, even more compelling when—as is common in federal employment—the bargaining unit is dispersed over many worksites and over a wide geographic area. In such circumstances, it is simply infeasible for a union to rely on worksite contacts as the principal means for establishing communication with employees.

The bargaining unit represented in this case by this respondent's local union vividly illustrates this point. American Federation of Government Employees Local 1345 represents a "world-wide" bargaining unit of Army and Air Force Exchange Service employees located at more than 70 separate facilities in all parts of the United States (including facilities in Alaska) and at facilities in Germany, Guam, and Okinawa.

<sup>6</sup> Petitioners contend that the only union interest in disclosure of employee addresses is its interest in the addresses of those who have consciously chosen not to become union members and, out of

The Federal Labor Statute's scheme of collective bargaining and representation—including its concepts of exclusive representation, good faith bargaining, and fair representation—is, of course, generally modelled on the principal labor relations statute in the private sector, the National Labor Relations Act ("NLRA").<sup>7</sup> It is thus particularly instructive that, under the NLRA, it has long been well settled that employers are obligated, as part of their duty to bargain in good faith, to furnish certified or recognized unions, upon request, with the names and addresses of all bargaining unit members. The basis of these holdings is that disclosure of such information is relevant and necessary for effective collective bargaining. *See, e.g., NLRB v. Associated General Contractors*, 633 F.2d 766, 773 (9th Cir. 1980), *cert. denied*,

privacy concerns, not to otherwise give the union their addresses. *See* "Br. Pet." at pp. 3 & 29.

Petitioners' assumption in this regard has no basis. A new employee, for example, if not subject to union mailings or any previous experiences in a unionized setting, may have little contact with union personnel, no full understanding of union services or the collective bargaining system, and therefore no reason to initiate contacts with the union. The failure of such an employee—who is far from atypical—to provide the union with a home address is probably far more a function of unfamiliarity with the union and its services (or simply inertia) than a function of some conscious privacy-based choice.

<sup>7</sup> *See, e.g.,* § 7101(a) (resting the finding that "labor organizations and collective bargaining in the civil service are in the public interest" on "experience in both private and public employment"); *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (noting similarity in language between certain NLRA and Federal Labor Statute provisions and following NLRA interpretation in construing such Federal Labor Statute provisions); *Bureau of Alcohol, Tobacco, & Firearms, supra*, 464 U.S. at 92-93 (noting that Federal Labor Statute was generally modelled on NLRA and FLRA was generally modelled on NLRB). Cf. *Letter Carriers v. Austin*, 418 U.S. 264, 274 (1974) (noting that Executive Order which was precursor to current Federal Labor Statute "adopted in large part the provisions and policies of the NLRA as its model" so that NLRA precedents are relevant to its proper interpretation).

452 U.S. 915 (1981); *NLRB v. Pearl Bookbinding* 517 F.2d 1108, 1113 (1st Cir. 1975); *United Aircraft v. NLRB*, 434 F.2d 1198, 1204-1206 (2d Cir. 1970), *cert. denied*, 401 U.S. 993 (1971); *Star Tribune*, 295 NLRB 543, 565 (1989); *Massillon Community Hosp.*, 282 NLRB 675, 682 (1987); *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978). *See generally* Pet. App. 14a & n.3 (noting NLRA cases) *FLRA v. U.S. Dept. of Treasury*, 884 F.2d 1446, 1458 (D.C. Cir. 1988) (R. B. Ginsburg, J. concurring) (same), *cert. denied*, 493 U.S. 1055 (1990).

*Second*, by any realistic assessment, the personal privacy interests invaded by the disclosure of an employee's home address are minimal at best.

For the overwhelming majority of employees, the information disclosed is already in the public domain. It is freely available and widely distributed in local telephone directories, and, since it is included in voter lists, license records, and other public documents, it is often a matter of public record. Most individuals disclose this information in a variety of casual commercial transactions, and many display the information on the face of their personal checks. Indeed, many coworkers will probably already possess general knowledge relating to an employee's home address (*e.g.*, the employee's neighborhood, town, commuting behavior, etc.). And, knowledge of an employee's home address will virtually never convey a seriously pejorative or embarrassing connotation. For these reasons, courts have generally not viewed the disclosure of home addresses, standing alone, as a substantial invasion of privacy.<sup>8</sup>

<sup>8</sup> See, *e.g.*, *FLRA v. U.S. Dept. of Navy*, 966 F.2d 747, 756 (3d Cir. 1992) (*en banc*) ("Home addresses . . . warrant a lesser degree of privacy because they do not implicate embarrassing or humiliating facts"); *FLRA v. U.S. Dept. of Treasury*, *supra*, 884 F.2d at 1460. (R. B. Ginsburg, J., concurring) ("An individual's mailing address . . . has no pejorative connotations. The local phone book prints names and addresses for most permanent residents of a com-

Disclosure of an employee's home address to the exclusive bargaining representative may, of course, subject the employee to a relatively modest volume of unsolicited mailings from that representative; but this fact certainly does not impose any significant invasion of privacy. Assuming the mailings are unwanted, they are a minimal addition to the "junk mail" which virtually all individuals receive, as a matter of course, throughout their lives. Individuals are able to dispose of such mail with minimal effort through the "short, though regular, journey from the mailbox to the trash can." *Lamont v. Commission of Motor Vehicles*, 269 F.Supp. 880, 883 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 449, *cert. denied*, 391 U.S. 915 (1968). As Judge Easterbrook wrote, the fact that mail usually "comes in response [to a disclosure of one's address] does not substantially impinge on seclusion; the addressee may send it to the circular file." *U.S. Dept. of Air Force v. FLRA*, *supra*, 888 F.2d at 232.<sup>9</sup>

Given the relative weights of these interests, it is not surprising that the FLRA—and every court that has weighed one of these interests against the other—has reached the same conclusion: *viz.*, when judged against the public interest in effective collective bargaining, the disclosure of an employee's home address to that employee's exclusive representation is *not* "a clearly unwarranted invasion of personal privacy." *See* Pet. App. 11a-12a (listing cases).

munity."); *U.S. Dept. of Air Force v. FLRA*, 838 F.2d 229, 232 (7th Cir. 1988) (Easterbrook, J.) ("Most home addresses are in the telephone book, freely available to anyone interested."), *cert. dismissed*, 488 U.S. 880 (1988).

<sup>9</sup> For many employees, of course—including many non-members of the union—these mailings will not be unwanted "junk." Even if unsolicited or unexpected, the mailings will have been made by the organization that has been statutorily charged with the role of serving as the employee's exclusive bargaining representative, and the mail may convey valuable information that is directly related to the security and quality of the employee-recipient's work life.

5. Petitioners do not dispute the proposition that the invasion of privacy worked by the disclosure of employee names and addresses to an exclusive bargaining representative would be “clearly warranted”—rather than “clearly unwarranted”—*if balanced against the public interest in an effective collective bargaining system*. Rather, petitioners contend that, in assessing whether an invasion of privacy is “clearly unwarranted” within the meaning of FOIA Exemption 6, the public interest in an effective collective bargaining system *simply cannot be considered*.

In essence, petitioners’ argument is that Congress, in passing the Federal Labor Statute, created an interplay between that statute, the Privacy Act, and FOIA that *excludes* any consideration of the public interests embodied in the Federal Labor Statute itself. On that supposition, in any given case, the public interest in a successful collective bargaining system (no matter how great) is always to be subordinated to an employee’s privacy interest (no matter how minor, and no matter how easily that privacy interest would be overcome by other public interests). *See, e.g.*, Br. Pet. 15 (“The key dispute in this case concerns what is weighed on the public interest side of the balance under FOIA Exemption 6. . . . Collective bargaining interests may not be weighed in the balance.”).

Petitioners’ position rests on their reading of *Reporters Committee, supra*. Petitioners read *Reporters Committee* as they do—and place their reliance on the Court’s decision so read—for the simplest of reasons: They have no viable alternative. Prior to that decision, *every court that had examined the issue presented here* had held (a) that the language, structure, and purposes of the relevant statutes—including FOIA Exemption 6—provide for consideration of the Federal Labor Statute’s declaration of a public interest in an effective collective bargaining system; and (b) that, in terms of that public interest, disclosure of employee names and addresses to the employees’ exclusive representative is “clearly warranted,” *not*

“clearly unwarranted.” *See Pet. App. 11a-12a* (listing cases). And, as we now show, *Reporters Committee* does *not* compel a contrary conclusion.

**The *Reporters Committee* decision**

*hold[s]* as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy, and that when the request seeks no “official information” about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is “unwarranted.” [489 U.S. at 780 (emphasis added).]

That holding cannot be said to determine the outcome of this case which has nothing to do with law enforcement records, purely private citizens, or records the Government is simply storing, and does have to do with official information, albeit of a unique kind.

But, say petitioners, the *Reporters Committee* Court, on the way to reaching that holding, articulated two operational rules for implementing FOIA, that do control here. As they put it, the decision

made clear that the purpose of FOIA is to make available “[o]fficial information that sheds light on an agency’s performance of its statutory duties” (489 U.S. at 773), and the Court further held that neither the identity of the requesting party nor the specific purpose of the request is relevant (*id.* at 771). Those principles make clear that there is no interest under FOIA favoring the release of information that facilitates collective bargaining but does not shed light on what the government is “up to.” [Br. Pet. 12-13.]

And, petitioners add, “[T]here is no statutory basis on which to construct two FOIA tests, one for requests aris-

ing under FOIA and one for requests originating under the Labor Statute." [Br. Pet. 16-17.]

The petitioners vastly overread *Reporters Committee*.

The "FOIA test" set out in *Reporters Committee* is a far more general one than petitioners allow; it is *not* a test comprised of the two specific operational rules for implementing FOIA Exemption 7(C) that petitioners note. The only statutory test announced in *Reporters Committee* is:

Exemption 7(C) requires us to balance the privacy interest in maintaining as the Government puts it, the "practical obscurity" of the rap sheets against the public interest in their release. [489 U.S. at 762.]

The office of the rules quoted by petitioner is to fill in the "public interest in . . . release" side of this balance in the context of the *Reporters Committee* case. *Reporters Committee*, after setting out the test just quoted, proceeds by discussing the "personal privacy" side of the balance (Part IV, 489 U.S. at 762-771) and then the "public interest in release" side (Parts V & VI, *id.*, at 771-780). The portions of the opinion petitioners quote are in Part V which "address[ed] what factors might warrant an invasion of the [privacy] interest described in Part IV." 489 U.S. at 749 (emphasis in original).

For present purposes, the critical point is that those rules are *not* generated by Exemption 7(C)'s (or Exemption 6's) *language* or by any *statutory provision* defining that language in whole or in any of its parts or by any *statutory provision* defining the phrase "public interest in . . . release." In terms of ordinary meaning, an action that affects privacy is "clearly unwarranted" only if the considerations that in fact caused the action are insufficient to justify the action. And the ordinary meaning of "public interest in . . . release" is far broader than the interest in "open[ing] agency action to the light of public scrutiny," 489 U.S. at 772.

Indeed, it was precisely because of the breadth of the phrase "public interest" that the Court proceeded as it did. While Part IV of *Reporters Committee* begins from the "common law and the literal understandings of privacy," 489 U.S. at 763, and then proceeds to a consideration of whether that understanding is carried forward in the FOIA, Parts V and VI of the opinion (which deal with the "public interest . . . in release" language) do not attempt any such analysis of the terms "public interest" or "unwarranted"; but instead draw a series of discrete lessons—what we have labeled operational rules—from the limited guidance provided by the overall structure and purposes of the FOIA *standing alone*. And, as Part VI of *Reporters Committee* makes explicit, in light of the uncertainty inherent in that approach, the Court in drawing up those rules was strongly influenced by its recognition that it is unusual to "assign[] federal judges the task of striking a proper case-by-case, or ad hoc, balance between individual privacy interests and the public interest in the disclosure of criminal-history information without providing those judges standards to assist in performing that task." 489 U.S. at 776. Parts V and VI of *Reporters Committee*, in other words, do *not* purport to establish *the* meaning of "unwarranted" or of the "public interest . . . in release" for all times and all contexts but only to provide workable standards for the run of pure FOIA cases such as the one before the Court.

The sum of the matter, then, is that nothing in *Reporters Committee* forecloses the consideration of *all* the relevant "public interests in . . . release" at stake in a case such as this case. What the decision establishes is the very limited range of relevant "public interests in . . . release" generated by the FOIA *standing alone*. And, what *Reporters Committee* does not address—much less determine—are the rules for elaborating "the public interest in . . . release" in a context in which the FOIA does *not* stand alone but is incorporated by reference in

another statute. That is the question of first impression presented here.

In answering that question, this Court is presented with a qualitatively more difficult task than the one the Court did confront in *Reporters Committee*. Here the Court has the “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, [a task which] necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” *United States v. Fausto*, 484 U.S. 439, 453 (1989). And, as we now show, every consideration supports the proposition that in a case arising in the context of the interplay of the Federal Labor Statute, the Privacy Act, and FOIA—as opposed to one arising in the pure FOIA context of *Reporters Committee*—the interest in an effective federal collective bargaining system may (and should) be included on the “public interest in . . . release” side of the Exemption 6 balance.<sup>10</sup>

(i) We begin by reemphasizing that *Reporters Committee* does not rest its refusal to consider “public interests in . . . release” other than the “FOIA’s central purpose,” 489 U.S. at 775, on any particular language in

<sup>10</sup> It is worthy of note that, although the premise of petitioners’ claim is that this case must be treated as a *pure* FOIA case—and must therefore be governed by *Reporters Committee*—petitioners also tacitly recognize the weakness of this premise by retreating from its logic. For example, petitioners do not contend that an exclusive bargaining representative, seeking to obtain personnel information under the Federal Labor Statute, must conform to the FOIA’s requirement that each request be “in accordance with [an agency’s] published rules stating the time, place, fees (if any) and procedures to be followed” for making FOIA requests. See 5 U.S.C. § 552(a)(3); *see also id.* § 552(a)(4)(A) (discussing agencies’ FOIA rights to require fee payments for costs associated with FOIA requests). And, petitioners do not argue that an agency would be privileged to refuse to provide an exclusive representative with information on the basis that, for example, the exclusive representative has failed to pay FOIA-associated fees.

the FOIA, much less on any “plain” or “inherent” meaning of the statutory language. Both before and after *Reporters Committee*, the word “unwarranted” means without “justification” in terms of whatever interests may be relevant to the inquiry. *Reporters Committee* refuses to sanction an assessment of amorphous “public interests,” such as the one the claimants there proffered, because Congress in the *only statute relevant to the case*—the FOIA—had only articulated the interest in “shedding light on an agency’s performance of its statutory duties.”

This case presents a very different context for decision, a context in which there is an *additional* statute at issue that does state an *additional* “public interest . . . in release.” The party seeking disclosure here is not seeking a free-wheeling assessment by the Court of “public interests” that Congress has neither articulated nor made relevant through legislation, but rather consideration of a statute which clearly declares an important public interest that would be served by disclosure of the information. And, here the methodology of *Reporters Committee*—*viz.*, looking to the relevant statutory background, structure, and purpose—militates for *inclusion* in the Exemption 6 balance of the proffered public interest in release (the interest in an effective federal collective bargaining system that is stated in the *Federal Labor Statute*) not its exclusion.

(ii) It is of equal importance that petitioners’ position undermines the purposes of the Federal Labor Statute. Indeed, petitioners’ position is that the public interests declared in the Labor Statute, *see 5 U.S.C. § 7101(a)*, are to be given *no weight whatsoever* in an important area of the Act’s administration, with the result that the public interest in an effective federal collective bargaining system is subordinated in all cases to individual privacy interests, no matter how compelling the public interest, and no matter how slight the privacy interests.

(iii) The Federal Labor Statute, moreover, provides no support for the proposition that Congress had any intent—much less a specific intent—to bring about such an anomalous result. The most obvious referent for the statutory language stating that an agency's disclosure obligation only goes “to the extent not prohibited by law” is that class of federal nondisclosure statutes that state unequivocal non-disclosure policies. Given the nature of such statutes, *see note 3, supra*, there was every reason to include in the Federal Labor Statute a ban on the disclosure already prohibited and no reason to believe that doing so would have any substantial impact on the effectiveness of the collective bargaining system. At the same time, the “to the extent not prohibited by law” language has no similarly clear prohibitory meaning in the case of a statute, such as the Privacy Act, whose non-disclosure policy is subject to exceptions that involve a balancing of the relevant public and private interests.

In the case of such a statute, it is at least as likely as not that Congress intended that the newly declared public interest in collective bargaining should be a part of the required balance, and thus should be a factor in determining whether disclosure would be prohibited. *See 5 U.S.C. §§ 552(b)(6), 552a(b)(2)*. Given the nature of the Privacy Act—covering, as it does, almost all personally identifiable employment records—a contrary intent would seriously cripple the effectiveness of federal sector collective bargaining. Particularly in light of the fact that the Federal Labor Statute language at issue was never even discussed in the legislative reports or debates, much less explained in the terms petitioners explain it, there is no basis for assigning to Congress such an unlikely and self-defeating intent.

(iv) The legal background to the Federal Labor Statute strongly militates against petitioners' position. Congress expressly rested its conclusion that collective bargaining would serve the public interest on the private sector

collective bargaining experience with which the Legislature was fully familiar. *See 5 U.S.C. § 7101(a)(1)*. Accordingly, Congress modelled many aspects of the statute—including the system of collective bargaining based on exclusive representation, the employer obligation to bargain in good faith, and the union duty to fairly represent all members of the bargaining unit—on the NLRA. *See pp. 11-12, supra*. As we have discussed, it was well established NLRA law at the time that Congress drafted, debated, and enacted the Federal Labor Statute, that the information at issue here is necessary to the collective bargaining process, and within the employer's disclosure obligation. *See id.* (listing cases).<sup>11</sup>

6. Against the foregoing, petitioners have argued that “most federal agencies” will furnish unions with individualized personnel information when it is truly “necessary” to collective bargaining pursuant to regulations promulgated by the Office of Personnel Management (“OPM”) governing disclosures to unions under the Privacy Act’s “routine use” exception, *5 U.S.C. § 552a(b)(3)*. Br. Pet. 28 n.8; *see also id.* at 9-10 n.2. *See generally* Federal Personnel Manual Letter 711-164 (1992) (“FPM Letter”) (official interpretation of OPM “routine use” regulations as they relate to disclosures to unions); 49 Fed. Reg. 36,949, 36,956 (1984) (OPM “routine use”

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<sup>11</sup> We note in this regard that—just as the FLRA would do under its construction of the Federal Labor Statute—the NLRB, in analyzing union requests for personnel information, engages in a balancing process accounting for *both* the interests of the collective bargaining system and the competing employee privacy interests. Thus, under the NLRA—as under the Federal Labor Statute, properly construed—employee privacy interests are recognized as valid interests that must be weighed in the legal balance in determining whether information relevant to collective bargaining must be disclosed to the exclusive bargaining representative. *See Detroit Edison v. NLRB*, 440 U.S. 301 (1979); *United Aircraft Corp.*, 192 NLRB 382, 390 (1971).

regulations).<sup>12</sup> This “reassurance” has a hollow sound to it.

To be sure, the OPM regulations—which only cover agencies within OPM’s jurisdiction and which were promulgated under Privacy Act authority (and not under any Federal Labor Statute authority)—do instruct agencies to disclose information to exclusive representatives “when relevant and necessary to their duties of exclusive representation,” FPM Letter, at 2; *see also* 49 Fed. Reg. 36,949, 36,956.

But OPM has construed *the scope* of an agency’s disclosure obligations under these regulations—*viz.*, the meaning of the terms “relevant” and “necessary”—*far more narrowly* than the FLRA has construed the scope of an agency’s disclosure obligations under the Federal Labor Statute. *See* 5 U.S.C. § 7114(b)(4). (For example, OPM rejects the proposition that exclusive representative should have access to employee home addresses, *see* FPM Letter). And, while OPM justifies these regulations in terms of Federal Labor Statute policies, OPM has persisted in its *refusal* to conform its interpretations to the interpretations of the FLRA. *See* FPM Letter, *supra*; Br. Pet. 9-10 n.2; *see generally* Bureau of Alcohol, Tobacco, & Firearms, 46 FLRA No. 22, Slip. op. at 10 (1992); *FLRA v. U.S. Dept. of Navy*, *supra*, 966 F.2d at 761-765; *FLRA v. U.S. Dept. of Treasury*, *supra*, 884 F.2d at 1453-1456.

Far from satisfying the policies of the Federal Labor Statute, petitioners’ insistence that exclusive bargaining representatives rely on OPM’s “routine use” regulations

<sup>12</sup> Under the “routine use” exception to the Privacy Act, 5 U.S.C. § 552a(b)(3), an agency may disclose information that would otherwise be protected by the Privacy Act if the disclosure is “for a purpose which is compatible with the purpose for which it was collected,” *id.* § 552a(a)(7) (defining “routine use”), and if the agency has published in the Federal Register a notice designating that purpose as a “routine use,” *id.* § 552a(e)(4)(D).

for access to the personnel information those representatives need, vividly illustrates the degree to which Congress’ Federal Labor Statute policies have been subverted.

*First*, by petitioners’ own measure, the OPM regulations are woefully under-inclusive. As petitioners argued below, the OPM regulations do not govern all agencies covered by the Federal Labor Statute, and, indeed, do not cover the agencies whose conduct is at issue in this very case. *See Brief for the Respondents/Cross-Petitioners*, Fifth Circuit No. 90-4722, at 41-44 (arguing that employees paid from nonappropriated funds of the military exchanges are not within OPM regulations, *citing* 5 U.S.C. § 2105). And, as far as we are aware, no other “routine use” regulation has been promulgated to give exclusive representatives of the employees of these agencies *any access whatsoever* to personnel information, no matter how “necessary” access may be to effective collective bargaining.

*Second*, the availability to agencies of the “routine use” exception serves to underline—not to alleviate—how far petitioners have gone in undermining the Federal Labor Statute’s collective bargaining system. Petitioners’ argument, in effect, concedes that the information at issue here *can*, “consistent with law,” be supplied to an exclusive representative, as long as “routine use” regulations are drafted to allow for such disclosure. There can be no more vivid demonstration that what is at issue here is *not* a determination by *Congress* that these employee records be kept from exclusive representatives, but simply a discretionary determination by *agency management*. In other words, the limitation on the federal agency’s obligations to provide collective bargaining information urged by petitioners do not flow from a “prohibit[ion] by law”—under any reasonable construction of that term—but from judgments by the agencies themselves regarding the extent to which they are willing to provide the information.

This turns the legal relationship between federal sector employers and federal sector exclusive bargaining representatives that was intended by Congress in the Federal Labor Statute on its head. The Labor Statute—in order to establish the preconditions of a collective bargaining system—grants *rights* to labor organizations that federal agencies are obligated by law to respect and that are enforceable against the agencies through FLRA proceedings. Congress did not intend that the ability of labor organizations to perform their role should depend on the discretion and good favor of agency managements.<sup>13</sup> Among those rights are the rights to necessary information set out in § 7114(b)(4).

Petitioners, however, would make union access to necessary personnel information dependent on the judgments and regulations adopted by agency managements. If the agency desires to have no disclosure of necessary personnel information, all that the agency need do is fail to include any provision for disclosures to unions in its “routine use” regulations. That is what has happened in the instant case. Alternatively, if the agency chooses to allow *some* disclosures, but also insists on determining for itself what the standards of disclosure should be—thereby making unions dependent on agency discretion, establishing the agency as the judge in its own cases, and, most dramatically, appropriating to the agency the role assigned by Congress to the FLRA—that is per-

missible as well. That description fairly characterizes the OPM regulations.

Neither of these options is the least bit compatible with the conception of collective bargaining intended by Congress in the Federal Labor Statute.

For these reasons, petitioners proffered interpretation of the Labor Statute and its interplay with the Privacy Act and FOIA must be seen for what it is: an entirely unlikely interpretation that is not compelled by statutory language or background, and that is simply untenable in terms of the policies that Congress embraced in the Labor Statute. As such, it should be rejected.

#### CONCLUSION

For the above-stated reasons, and those stated by the respondent Federal Labor Relations Authority, the judgment below should be affirmed.

Respectfully submitted,

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<sup>13</sup> See *Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, *supra*, 464 U.S. at 92-93 (“The new Act, declaring that “labor organizations and collective bargaining in the civil service are in the public interest,” 5 U.S.C. § 7101(a) significantly strengthened the position of public employee unions. . . . The Act replaced the management-controlled Federal Labor Relations Council with the FLRA, a three-member independent and bipartisan body within the Executive Branch with responsibility for supervising the collective bargaining process and administering other aspects of federal labor relations established by [the Act]. § 7104. The Authority[’s] role . . . in the public sector is analogous to the National Labor Relations Board in the private sector, see H.R. Rep. No. 95-1403, p. 41 (1978.”).

No. 92-1223

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,  
PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONERS

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## REPLY BRIEF FOR THE PETITIONERS

The FLRA argues (Br. 23) that “[i]t is senseless” to decline to weigh collective bargaining interests in the FOIA disclosure balance. As an initial matter, however, the statutory language compels that approach. Moreover, it leads to a sensible result that protects privacy interests in this case.

1. In 5 U.S.C. 7114(b)(4), the Labor Statute calls for the disclosure of information to unions, but only “to the extent not prohibited by law.” The FLRA acknowledges (Br. 19) that “[t]his general reference brings the Privacy Act into Section 7114(b)(4) analysis,” and that “[t]he Privacy Act’s bar to unconsented disclosure of personal data would apply here, unless an exception to that general rule applies.” That is

(1)

what Congress must have intended when it enacted Section 7114(b)(4) in 1978, since it was entirely foreseeable that the Privacy Act of 1974 would bar the release of some information that unions might find useful. Congress nevertheless authorized the release of information under the Labor Statute only to the extent that release would be permitted under the Privacy Act.<sup>1</sup>

The further conclusion that collective bargaining interests are not relevant under the Privacy Act is compelled by the text of the Privacy Act, which contains no exception providing for the release of information that fosters collective bargaining. The only exception to the Privacy Act relied on by the respondents in this case is Exception (b)(2), 5 U.S.C. 552a(b)(2), which authorizes disclosures "required under" FOIA. And like the Privacy Act, FOIA does

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<sup>1</sup> The AFGE suggests (Br. 7) that Congress was focusing on statutes prohibiting disclosure in "unequivocal terms," such as 42 U.S.C. 2165, 2167, and 2168 (atomic energy information), 13 U.S.C. 8(b), 9(a) (census data), and Fed. R. Crim. P. 6(e) (grand jury records), rather than statutes such as the Privacy Act that have exceptions that call for the weighing of specified interests. But it would be unusual for a union to contend that grand jury information, census data, or atomic energy information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" under Section 7114(b)(4)(B), whereas personal information about employees would be relevant in many cases. Accordingly, it seems far more likely that Congress was thinking of the Privacy Act than the statutes listed by the AFGE when it authorized disclosure under Section 7114(b)(4) only "to the extent not prohibited by law." In any event, Congress made no distinction in the Labor Statute between statutes posing "unequivocal" bars and statutes that permit disclosure in some circumstances.

not authorize consideration of collective bargaining interests. To the contrary, as this Court held in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989), FOIA authorizes the disclosure of information that reveals what the government is "up to," and does not authorize "disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." Accordingly, "[o]nce placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public." *FLRA v. Department of Treasury*, 884 F.2d 1446, 1457 (D.C. Cir. 1989) (R. Ginsburg, J., concurring), cert. denied, 493 U.S. 1055 (1990).

For the same reason, contrary to the FLRA's contention (Br. 30), *Reporters Committee* is not distinguishable on the ground that the request for information in that case "was made directly under the FOIA itself, while the data requests in the instant case were made under Section 7114(b)(4) of the Labor Statute." The request here ultimately arises "wholly within the FOIA's domain," as Judge Ginsburg put it, 884 F.2d at 1457, and FOIA does not call for consideration of collective bargaining interests. To the contrary, as *Reporters Committee* makes clear, FOIA provides for the disclosure of information that reveals what the government is up to (if the interest in disclosing what the government is up to outweighs the privacy interest at stake).<sup>2</sup>

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<sup>2</sup> The FLRA also suggests (Br. 32-33) that *Reporters Committee* is distinguishable because it involved FOIA Exemption 7(C), while this case involves Exemption 6. But like the court

The FLRA notes (Br. 31) that certain FOIA provisions, such as its jurisdictional and attorney's fees provisions, are not applicable here, and contends on that basis that the FOIA test must be adapted to include consideration of collective bargaining interests when a request for information is made by a union. That conclusion does not follow. The Privacy Act permits disclosures "required under" FOIA, 5 U.S.C. 552a(b)(2), thus authorizing disclosure where the substantive standards of FOIA call for disclosure. But the Privacy Act does not incorporate FOIA's procedural requirements. Accordingly, the question here is whether the names and home addresses that the unions have requested are disclosable under FOIA Exemption 6, not whether the unions have complied with FOIA's procedural requirements.

Although the thrust of the argument in the FLRA's brief is that collective bargaining interests must be weighed in the FOIA balance, the FLRA also contends that disclosure is warranted under a "derivative use" theory. That is, the FLRA argues in the alternative (Br. 46 n.24) that the home addresses of federal employees should be released to the general public because that will permit "any person interested in learning about operation of the subject agencies to question employees at home and obtain more candid information about agency operations

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of appeals, the FLRA fails to explain how any difference between Exemption 6 and Exemption 7(C) is relevant to the dispute in this case. Moreover, in *Department of State v. Ray*, 112 S. Ct. 541, 549 (1991), an Exemption 6 case, this Court applied *Reporters' Committee* in concluding that the sort of information that is disclosable under FOIA is information that tells what the government is "up to."

than if the employee were contacted at work." As an initial matter, that argument was not a ground for the FLRA's decisions in these cases, and therefore does not provide a basis for affirmance by this Court. See *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). In any event, the FLRA's derivative use approach has no merit. "Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy." *Department of State v. Ray*, 112 S. Ct. 541, 549 (1991). In this case, the public benefits to be derived from derivative uses of federal employees' home addresses are entirely hypothetical, while the invasion of privacy that would result from the disclosure of home addresses to the general public—which may include commercial opportunists, disgruntled persons, persistent job seekers, etc.—is real and substantial. Moreover, as the Second Circuit stated, "[c]ompelling disclosure of personal information, that has no relationship to an agency's activities, on so attenuated a basis would inevitably result in the disclosure of virtually all personal information, thereby effectively eviscerating the protections of privacy provided by Exemption 6." *FLRA v. Department of Veterans Affairs*, 958 F.2d 503, 512 (1992).

2. The FLRA acknowledges (Br. 41) "that employees have some privacy interest in their home addresses." Accordingly, if, as we contend, there is no cognizable interest in disclosing employees' home addresses, the resolution of the balancing required under FOIA Exemption 6 is straightforward. As the court of appeals stated, "if one applies the restrictions announced in *Reporters' Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited." Pet. App. 19a.

As we have shown, there is no basis for distinguishing *Reporters Committee*. Nor is there any reason to reconsider it. The contentions of the FLRA and the unions about the dire consequences that will flow from withholding employees' home addresses and other personal information are greatly exaggerated.

As an initial matter, the FLRA and the unions underestimate the extent of the invasion of privacy that may be caused by the disclosure of home addresses. The AFGE states (Br. 13) that the intrusion caused by unwanted mailings is relatively limited since employees may deposit them in the garbage. But a home address is also helpful in identifying a home telephone number, and it is not as easy to get rid of an unwanted caller as it is to get rid of an unwanted letter. And a home address also makes a home visit possible, even if the employee has an unlisted telephone number. Furthermore, as the FLRA acknowledged in its *Portsmouth* decision, *United States Department of the Navy, Portsmouth Naval Shipyard*, 37 F.L.R.A. 515, 533, (1990), application for enforcement denied and cross-petition for review granted *sub nom. FLRA v. Department of the Navy*, 941 F.2d 49 (1st Cir. 1991) there is no reason why a union cannot sell a list of names and home addresses of federal employees to entrepreneurs and fund-raisers, thus multiplying the number of unwanted letters, callers, and visitors.<sup>3</sup> In light of the

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<sup>3</sup> The Privacy Act provides for various remedies, including damages, from an agency that releases information that should not be disclosed. See 5 U.S.C. 552a(g). But there is no provision in the Privacy Act for obtaining relief from a private party, such as a union, in such circumstances. Indeed, there appears to be no avenue for employees to obtain adequate relief from a union that makes unauthorized disclosures. See *FLRA*

consequences that are likely to follow from the disclosure of a home address, those employees who have declined to give their home addresses to unions would surely disagree with the FLRA's assertion (Br. 41) that they have a "minimal" interest in protecting their home addresses from compulsory disclosure. "Even today, when sophisticated mail and telephone marketing techniques have rendered most homes an easy mark for an astonishing variety of unwanted sales pitches, opinion polls, and other solicitations, the fundamental principle that a person has a right to keep out unwanted intruders 'has lost none of its vitality.'" *FLRA v. United States Dep't of Navy, Navy Ships Parts Control Center*, 966 F.2d 747, 771 (3d Cir. 1992) (Rosenn, J., dissenting).

The FLRA's disregard of privacy interests was evident in its decision in the *Portsmouth* case, in which the FLRA announced its general policy of ordering the release of employees' home addresses. The FLRA recognized that federal unions may contact employees at work, but decided that home contact is preferable because "[i]n the home environment, the employee has the leisure *and the privacy* to give the full and thoughtful attention to the union's message that the workplace generally does not permit." 37 F.L.R.A. at 532 (emphasis added). Thus, the FLRA recognized that federal employees enjoy the privacy of their homes, and concluded *for that reason* to turn employees' home addresses over to unions. We submit, to the contrary, that recognition of the fact that federal employees enjoy the privacy of

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*v. United States Dep't of Defense*, 977 F.2d 545, 549 n.6 (11th Cir. 1992).

their homes should have led the FLRA to respect that right to privacy.

On the other hand, as the AFGE paraphrases a point made in our opening brief (at 10-11 n.6), “the only union interest in disclosure of employee addresses is its interest in the addresses of those who have consciously chosen not to become union members and, out of privacy concerns, not to otherwise give the union their addresses.” That is, the unions have the home addresses of their members and may ask other members of the bargaining unit for their home addresses, so the only reason for additional disclosure in these cases is to override the choices of federal employees who do not want to disclose their home addresses to unions. The AFGE claims (Br. 11 n.6) in response that new employees, “if not subject to union mailings,” may decline to provide their home addresses more as “a function of unfamiliarity with the union and its services (or simply inertia) than a function of some conscious privacy-based choice.”<sup>4</sup> But it remains the fact that unions may contact new employees at work and familiarize them with their services, and ask for their home addresses. Unions will then have the home addresses of all members of the bargaining unit except those who do not want to disclose them. Ordering the disclosure of the home addresses of employees who have declined to provide them is contrary to the principle, recognized by this Court in *Reporters Committee*, 489 U.S. at 763, that

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<sup>4</sup> The NTEU has a similar view of those federal employees who do not provide it with their home addresses. It claims (Amicus Br. 13) that they “most often are simply ignorant of the union’s existence or services, are apathetic, or are disinclined to pay dues.”

the right to control the dissemination of personal information is central to the right embodied in the Privacy Act.

At the same time, the only benefit of compulsory disclosure of home addresses is whatever marginal benefit results from contacting employees at home when they prefer to be contacted at work, since it is not difficult, either as a general matter or with respect to the employees affected by these cases, for the unions to contact federal employees at work. The AFGE merely asserts (Br. 10 n.5) that it prefers not “to rely on worksite contacts as the principal means for establishing communication with employees.” But as the First Circuit stated, “where, as here, \*\*\* contact may easily be made at the workplace,” any problem with arranging further communications “may be addressed by making mutually agreeable arrangements to meet or speak elsewhere.” *FLRA v. United States Dep’t of Navy, Naval Communications*, 941 F.2d 49, 57 (1st Cir. 1991).

Moreover, federal unions have an avenue for assuring contact with employees that is not available to private sector unions. In the private sector, if a matter is negotiable, that just means that the employer must bargain in good faith about it—so an employer need not give in to a request for additional worksite contact and may extract a *quid pro quo* if it agrees to permit additional worksite contact. In the federal sector, in contrast, if a proposal concerns a negotiable topic, the Federal Service Impasses Panel may impose the proposal on an agency over its objection. See 5 U.S.C. 7119(c)(5). Each of the briefs supporting affirmance has ignored this difference between the private sector and the federal sector, even though it is discussed in our opening brief (at 28-

29). Thus, in an unusual circumstance where it really has been difficult to contact employees at work, a union could obtain a means of ensuring that union letters or other communications reach members of the bargaining unit. Indeed, it is common practice for unions and federal agencies to negotiate over proposals to contact employees at work. See, *e.g.*, *United States Dep't of HHS v. FLRA*, 976 F.2d 229, 231 (4th Cir. 1992). Moreover, in each of these cases the title, grade, and work location of all bargaining unit employees were released, C.A. App. 58, 60, 113, and there has been no showing that local union representatives have been unable to contact and communicate with members of the bargaining unit at work.

Beyond home addresses, the only item of information that is at issue here, the FLRA contends that unions need "a wide array of personal data concerning individual employees" (Br. 33-34), and argues that the impact on federal sector labor relations of reading the Privacy Act to protect personal information about federal employees "is obvious and grave" (Br. 35). As is the case with respect to home addresses, we submit that the significance of any detrimental impact on the collective bargaining process resulting from the nondisclosure of other sorts of personal information will largely dissipate upon examination, particularly since personal information is available to unions in three ways. First, the Privacy Act does not prohibit the release of personal information where the individual to whom the information pertains consents to its release. See 5 U.S.C. 552a(b). Second, as we explain in our opening brief (at 27), it is often possible to provide redacted information that both protects individual privacy and gives the union the information it needs. And third, the Privacy Act authorizes disclo-

sures pursuant to "routine use" regulations, and the Office of Personnel Management has promulgated a routine use regulation authorizing the release of various sorts of information to unions, see 49 Fed. Reg. 36,949, 36,956 (1984), where the information is to be used "for a purpose which is compatible with the purpose for which it was collected," 5 U.S.C. 552a(a)(7).<sup>5</sup>

Contrary to the AFGE's claim (Br. 23), the routine use exception to the Privacy Act, 5 U.S.C. 552a(b)(3), does not authorize agency management to violate the privacy rights of federal employees. The Privacy Act establishes both procedural restrictions on disclosures pursuant to routine use regulations, 5 U.S.C. 552a(e)(4)(D), and the substantive requirement that the information must be used for a purpose that is compatible with the purpose for which it was collected. See *Britt v. Naval Investigative Service*, 886 F.2d 544, 547-550 (3d Cir. 1989) (Navy erred by disclosing investigative records to the INS). The AFGE's real complaint appears to be that Congress has lodged authority over routine use regulations primarily with OPM rather than the FLRA. But by

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<sup>5</sup> OPM's routine use regulation, which applies to most federal agencies, does not apply to military exchange services such as those involved in this case. See 5 U.S.C. 2105. But the AFGE errs in stating (Br. 23) that "no other 'routine use' regulation has been promulgated to give exclusive representatives of the employees of these agencies *any access whatsoever* to personnel information." The Navy Exchanges have promulgated a regulation providing for the release of information "[t]o officials of labor organizations recognized under the Civil Service Reform Act when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices and matters affecting working conditions." 58 Fed. Reg. 10,824 (1993).

placing primary authority with OPM rather than a specialized agency that is focused on labor relations, Congress helped to “ensure that the disclosure provisions of the Labor-Management Relations Act do not trump the more important policy objectives of the Privacy Act.” *FLRA v. Department of Veterans Affairs*, 958 F.2d at 513.

3. The FLRA recognizes (Br. 38) that the Privacy Act applies to federal employees, but not to private sector employees. The FLRA nevertheless makes the extraordinary claim (*ibid.*) that “federal employees have even less reason to expect a privacy interest as to work-related personal information than do private employees.” See also NTEU Amicus Br. 18 (“[t]he government identifies nothing in the Privacy Act or its legislative history to show any consideration of federal employee privacy”). That premise appears to have guided the FLRA in deciding these cases and the related cases in which it has ordered the release of various sorts of personnel files. See, e.g., *Department of Labor v. FLRA*, 39 F.L.R.A. 531 (1991), remanded on other grounds, No. 91-1174 (D.C. Cir. Order of Jan. 7, 1992) (unredacted suspension records); *FLRA v. Department of Commerce*, 38 F.L.R.A. 120 (1990), rev’d, 962 F.2d 1055 (D.C. Cir. 1992) (names and duty stations of employees receiving outstanding or commendable ratings); *Department of HHS v. FLRA*, 43 F.L.R.A. 164 (1991), rev’d, No. 92-1012 (D.C. Cir. Dec. 10, 1992) (unsanitized performance appraisals); see also *Department of Energy v. FLRA*, 41 F.L.R.A. 1241 (1991), appeal pending, No. 91-1514 (D.C. Cir.) (requiring bargaining over the release of unsanitized notices stating that an agency suspects that a particular employee is abusing drugs). But the FLRA’s premise is erroneous: the Privacy

Act is built into Section 7114(b)(4) of the Labor Statute, which authorizes disclosures to unions only “to the extent not prohibited by law,” and no exception to the Privacy Act authorizes disclosures that promote collective bargaining interests. As the D.C. Circuit held, the FLRA engaged in an “imaginative reconstruction” of the relevant statutes by reading collective bargaining interests into the FOIA balance and holding that they outweigh the privacy interests of federal employees. *FLRA v. Department of Treasury*, 884 F.2d at 1453. Fidelity to Congress’s enactments precludes such a “reconstruction.”

\* \* \* \* \*

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III  
Solicitor General

AUGUST 1993

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(5)

No. 92-1223

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1992

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U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT  
OF NAVY, NAVY CBC EXCHANGE, CONSTRUCTION  
BATTALION CENTER, GULFPORT, MISSISSIPPI,  
and the U.S. DEPARTMENT OF DEFENSE, ARMY  
and AIR FORCE EXCHANGE, DALLAS, TEXAS, *Petitioners*,

v.

FEDERAL LABOR RELATIONS AUTHORITY and  
AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, *Respondents*.

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF  
THE NATIONAL RIGHT TO WORK LEGAL DEFENSE  
FOUNDATION, INC., AND BRIEF *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF  
THE NATIONAL RIGHT TO WORK LEGAL DEFENSE  
FOUNDATION, INC., AND BRIEF *AMICUS CURIAE* IN  
SUPPORT OF PETITIONERS

INTRODUCTION

Pursuant to Rule 37.4 of the Rules of this Court, the National Right to Work Legal Defense Foundation, Inc. ("Foundation") moves for leave to file and hereby files this brief *amicus curiae* in support of petitioners. Pursuant to Rule 37.3 of the Rules of this Court, by letter dated April 20, 1993, to counsel representing the interest of the parties to the case, counsel for the Foundation requested consent to the filing of this brief.

When this brief went to print, counsel had received written consent from the Federal Labor Relations Authority ("FLRA") to the filing of this brief. Counsel has not received a response to his request from any of the other parties. Under cover letter to the Clerk of this Court, with the filing of this brief, counsel has provided copies of the letters he addressed to the representatives of the parties.

#### INTEREST OF THE *AMICUS CURIAE*

The Foundation is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. As such, the Foundation aids employees who have been denied, or coerced in the exercise of, their right to refrain from the collective activity foisted upon them by forced association. In the seminal cases of *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986) and *Communications Workers v. Beck*, 487 U.S. 735 (1988), Foundation attorneys helped to establish important precedents protecting individual employee rights in the workplace against the abuses of compulsory unionism. Similarly, in this case the Foundation is critically concerned about the rights of individual employees in the workplace as it relates to their privacy rights and their right to be free from harassment and intimidation at their personal residence. For these reasons, the Foundation respectfully files this brief in support of employee privacy rights.

#### SUMMARY OF THE ARGUMENT

The disclosure of federal employees' home addresses to the bargaining representative representing their bargaining unit is a clearly unwarranted invasion of the employees' personal privacy within the meaning of the Privacy Act and the Freedom of Information Act. This invasion of employee rights cannot be justified under a claim that a labor organization needs the information to fulfill its obligations under the Federal Services Labor-Management Relations Statutes. Federal employees enjoy the Right to Work free from any form of coerced union associa-

tion, and accordingly, a bargaining representative cannot demonstrate any legitimate work-related basis for requiring this very personal and private information. Rather, information such as this can be used as a mechanism for chilling the exercise of individual employee rights. For these reasons, individual rights should not be sacrificed for so-called "collective bargaining facilitation."

#### ARGUMENT

##### I. The Privacy Act is an unqualified right enjoyed by individuals to be free from interference in their private lives. To allow discovery of the home addresses of nonunion member employees by a labor organization with whom the employees have chosen not to associate is a blatant invasion of this right.

This case concerns one fundamental right enjoyed by every American, and that is the right to privacy. Whether this right is raised in the context of the United States Constitution or, as in this case, in the context of the Privacy Act, this Court must not accept the invitation to sacrifice this right to expedite organized labor's purposes, whether these purposes are purportedly "legitimate" or not. Allowing a labor organization to discover the home addresses of all employees—both union members and nonmembers—impinges on every employee's privacy interests.

That the Privacy Act of 1974, 5 U.S.C. § 552a(b) bars the release of home addresses of employees to any private entity cannot be seriously debated. The statute specifically provides that "[n]o agency shall disclose any record \* \* \* except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." By its own terms, the statute is *unqualified vis-a-vis* the institutional prerogative of a private entity. Rather, the statute provides a very limited exception in favor of the *individual* enjoying the protection of the statute, to be exercised at his or her sole discretion.

There is no qualification in the Privacy Act that places a labor organization in a preferred status not subject to the clear language of the statute. Neither is there any statutory language or legislative history to support the conclusion that Congress intended to consider the interest in collective bargaining<sup>1</sup> that organized labor purports to enjoy under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114 ("FLRS") to eviscerate the protections that all individuals enjoy under the Privacy Act. Rather, the FLRS, by its own terms, provides that federal agencies are to furnish information to unions only "to the extent not prohibited by law," 5 U.S.C. § 7114(b)(4). It has not been suggested that the Privacy Act is not a law, nor is there any legislative exemption provided to labor organizations under the FLRS, or any other statute, to the requirements of the Privacy Act. This Court should not accept the invitation to create, by judicial edict, that which has not been developed by legislative process.

The most illustrative case showing the problems in allowing labor organizations to obtain employees' home addresses is presented in the FLRA case of *Department of Navy, United States Naval Ordnance Station*, 33 FLRA 3 (1988) in which a federal employee raised the very issue that concerns the Foundation as

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<sup>1</sup> In 1969, President Richard Nixon revised the rules governing labor relations in the federal service by amending § 1(a) of Executive Order 10988, 3 CFR 521 (1959-1963) with § 12 (c) of Executive Order 11491, 3 CFR 861, 870 (1966-1970), to make the federal service collective bargaining law read as follows:

Section 1.(a) Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.

[Section 12.](c) nothing in the agreement shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization except pursuant to a voluntary, written authorization by a member for the payment of dues through payroll deductions.

an institution actively working on behalf of individual employees against the abuses of compulsory unionism. In *Naval Ordnance*, an employee wanted to keep his home address private because a union member had threatened and harassed him at home. The FLRA, however, chose to sacrifice this employee's rights in favor of the union's interest in "promoting collective bargaining." Since federal labor organizations enjoy the limited right to collective bargaining under federal labor law, subject to, *inter alia*, the Right-to-Work protections enjoyed by federal employees, the information on home addresses can be sought *directly* from the union's voluntary members. There is no legitimate basis for the compelled production of this personal information from nonmembers. Accordingly, the focus must be on the illegitimate purposes that can be accomplished through this information.

Harassment directed at nonunion member employees by union adherents is not foreign in the field of labor relations. Studies show that almost every variety of physical force and psychological intimidation is used to intimidate or coerce nonunion members. See, e.g., A.J. Thieblot & T.R. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures and the NLRB*, Labor Rel'n's & Public Policy Series #25 (Wharton School, Industrial Research Unit, U. of Pa.), 1983. Statistics presented by Thieblot and Haggard indicate that the violence oftentimes is directed at the homes of the victims of labor violence.

Damaging automobile tires or other parts of cars is not, of course, an end in itself, but is instead a means of conveying a message to the owner. Usually the message pertains to the evils of crossing a picket line to work at a struck plant. Some attacks on automobiles are more-or-less random in nature, and do arise out of picket line confrontations. Others are more personal and, therefore, more frightening. Excluding for a moment the obviously heinous crimes (such as murder and assault with intent to kill), the most chilling forms of violence during labor disputes, are those which single out the victims as individual targets, particularly when the

violence occurs away from the workplace. When one's car is firebombed in one's garage, when a shotgun blast comes through the bedroom window in the dead of night, when the phone rings once every twenty-five minutes for four days and delivers anonymous threats—those are the times that try men's souls, and cause them to ask themselves whether freedom is worth its price.

*Id.* at 487-88.

This Court has on several occasions recognized the sanctity of a home or private residence against unwanted intrusion. The home has been recognized as "the last citadel of the tired, the weary, and the sick." *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969). Further, "preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey v. Brown*, 447 U.S. 455, 471 (1980).

"One important aspect of residential privacy is protection of the unwilling listener." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

Organized labor has long used the picketing of homes of nonadherents as a form of intimidation or coercion. *See, e.g., Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 124 N.J. Eq. 71, 199 A. 598 (1938); *Pipe Machinery Co. v. DeMore*, 36 Ohio Op. 342, 76 N.E.2d 725 (1947).

And unfortunately, labor violence and harassment is a fact of life in labor relations. Its effects can include death, personal injury and property damage. "The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt." *Frisby*, 487 U.S. at 486. "'To those inside \* \* \* the home becomes something less than a home when and while the picketing \* \* \* continue[s]. \* \* \* [The] tension and pressures may be psychological not physical, but they are not, for that reason less inimical to family privacy and truly domestic tranquility.'" *Carey*, 447 U.S. at 478 (Rehnquist, J. dissenting) (quoting

*Wauwatosa v. King*, 49 Wis.2d 398, 411-12, 182 N.W.2d 530, 537 (1971)). This form of coercion has not lessened with the passage of time, and such circumstances will continue unabated unless actions are taken and employee rights are protected to prevent the facilitation of organized labor's illegitimate goals. This action must include refusing to facilitate the process of harassment and intimidation by providing the home addresses of individual employees who have chosen *not to* participate in collective bargaining.

**II. The purpose of the Freedom of Information Act is to foster public understanding of the actions of government, not "to simplify the process of collective bargaining."**

It is respectfully suggested that the Freedom of Information Act ("FOIA") provides no basis whatsoever for undermining the protections employees enjoy under the Privacy Act. The core purpose of the FOIA is defined as "'contribut[ing] significantly to public understanding of the operations or activities of the government.'" *United States Department of Justice v. Reporters Committee*, 489 U.S. 749, 775 (1989) (emphasis in original).

In all of the briefs reviewed by counsel, neither the represented labor organizations nor the Federal Labor Relations Authority has yet to provide a cogent explanation as to how organized labor's possession of this private information in any way serves the interest of advancing *public understanding* of the operation of government. The *labor organizations* have only one interest, and that interest is to serve their own political and social agenda. This interest is not to advance *public understanding* of government, but rather to advance organized labor's institutional prerogatives.

As recognized in *United States Department of Navy v. Federal Labor Relations Authority*, 975 F.2d 348, 355 (7th Cir. 1992) (emphasis in original), "the *only* public interest cognizable under FOIA is the interest of the citizenry in obtaining information about the activities of its government." The federal labor

organizations and the Federal Labor Relations Authority miss the main thrust of this statutory mandate by substituting the *labor organization's* purported institutional interest for the *public's interest*, and further pervert the statute by removing the focus from the interest of the *citizenry* in obtaining information about the activities of the *government* and inserting in its stead the interest of *organized labor* in obtaining personal information about employees in the workplace. *Cf. Elrod v. Burns*, 427 U.S. 347, 362 (1976) (in First Amendment context, "care must be taken not to confuse the interest of partisan organizations with governmental interests").

In short, neither the FOIA nor the FLRS grants rights, powers, or privileges to federal sector *labor organizations*. Rather, *employees* are immunized by the Privacy Act from interference in their private lives. These protections, emanating from constitutional rights, powers, and privileges grounded in the Fifth Amendment of the United States Constitution, cannot be sacrificed for whatever veiled purpose a labor organization might articulate in the context of collective bargaining.

#### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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**BRIEF FOR AMICUS CURIAE  
NATIONAL TREASURY EMPLOYEES UNION  
IN SUPPORT OF RESPONDENTS**

---

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## **QUESTION PRESENTED**

Whether a federal agency, which is required by the Federal Service Labor-Management Relations Statute (5 U.S.C. 7114(b)(4)) to furnish the names and home addresses of bargaining unit employees to the union that is their exclusive representative, may nonetheless refuse to disclose that information on the basis of the Privacy Act (5 U.S.C. 552a).

(i)

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1223

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,  
*Petitioners*,  
v.FEDERAL LABOR RELATIONS AUTHORITY, *et al.*On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth CircuitBRIEF FOR AMICUS CURIAE  
NATIONAL TREASURY EMPLOYEES UNION  
IN SUPPORT OF RESPONDENTS

## INTEREST OF THE AMICUS

Amicus, the National Treasury Employees Union (NTEU), is a federal sector labor organization that is the exclusive collective bargaining representative of approximately 150,000 employees of the federal government nationwide. NTEU has a vital interest in the resolution of the issue presented in this case—whether federal agency employers are relieved of their statutory obligation to provide unions with the names and home addresses of bargaining unit employees by the Privacy Act.

The issue presented has great practical significance for unions and the employees they represent because direct home mailings are an essential tool of communication.

Often, such mailings are the only effective means of ensuring the timely exchange of important information between the union and bargaining unit employees. Ensuring effective communication between the union and its constituents is vital to the union's discharge of its statutory responsibilities and to meaningful collective bargaining.

Because union security agreements are prohibited in the federal workplace (5 U.S.C. 7102), federal sector unions face an additional obstacle in their efforts to represent the interests of the unit as a whole. Approximately 40% of NTEU's bargaining units consist of non-members. These individuals are often less likely to take the initiative to contact the union with their concerns or to have received the union's direct invitation to do so. As a result, the union receives most of its input from active members and is often unable to accurately assess whether their concerns are shared by the non-member, whose interests it is also required to fairly represent. 5 U.S.C. 7114(a)(1).

For these reasons, before 1989, NTEU had routinely sought and obtained the agreement of federal agencies, in collective bargaining, to provide the union with periodically updated listings of the names and home addresses of all employees in the bargaining unit. NTEU used the addresses to communicate directly with employees about their rights, to solicit their support for the union's efforts, and to conduct surveys in connection with collective bargaining.

After the D.C. Circuit's 1989 decision in *FLRA v. Department of Treasury*,<sup>1</sup> however, in accordance with a new government-wide policy, the agencies with whom NTEU had agreements repudiated these contract provisions. Since that time, agencies have refused to pro-

<sup>1</sup> 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990).

vide NTEU with the home address of any of the employees it represents—member and non-member alike.

The policy of refusing to provide home addresses seriously interferes with the union's ability to serve its constituents. The bargaining units served by NTEU, like those served by other major federal sector labor organizations, are large and geographically dispersed. For that reason, among others, home mailings are the only dependable way to reach unit employees on a comprehensive basis or to furnish time sensitive information.

Equally important, if the government's position is approved, Congress' intent to give the collective bargaining process and labor organizations a meaningful role in the federal civil service will be seriously undermined. For under the government's interpretation of the law, whenever *any* privacy interest—even the most insignificant one—is implicated, the union cannot obtain access to relevant data, no matter how compelling its need. That result both dramatically shifts the balance of power at the bargaining table in favor of the employer and disables the union from providing effective representation to the unit as a whole. NTEU is therefore submitting this brief, to assist the Court in resolving the important questions presented.

#### SUMMARY OF ARGUMENT

This Court should reject the government's argument that disclosure of employee names and home addresses to the union pursuant to the Federal Service Labor-Management Relations Statute<sup>2</sup> (the "labor statute") would result in a "clearly unwarranted invasion of employee privacy" within the meaning of 5 U.S.C. 552(b) (6). The indispensable premise of that argument is that in striking a balance between employee privacy interests and the public interests served by disclosure, the Court is forbidden to consider 1) Congress' express finding that

<sup>2</sup> 5 U.S.C. 7101 *et seq.*

unions and collective bargaining in the federal sector promote the public interest (5 U.S.C. 7101(a)) and 2) the unchallenged conclusion of the Federal Labor Relations Authority ("FLRA") that the disclosure at issue is "necessary" to enable unions to discharge their responsibilities under the statutory labor-management relations scheme. That premise finds no support in the statutory provisions at issue, or in this Court's decisions.

A. The FLRA's decision that disclosure of home addresses pursuant to the labor statute does not violate the Privacy Act<sup>3</sup> comports with the plain language of both that Act and the Freedom of Information Act ("FOIA").<sup>4</sup> Those statutes prohibit the disclosure of information in personnel files only when a "clearly unwarranted invasion of personal privacy" would result. 5 U.S.C. 552(b)(6). The disclosure of home addresses to the union does not result in an "unwarranted" privacy invasion because it directly serves the statutorily recognized public interest in collective bargaining in the civil service. That important public interest outweighs whatever minor interference with their "privacy" some employees may perceive when they receive correspondence from their bargaining representative at home.

B. There is no merit to the government's contention that the terms of the Privacy Act and the Freedom of Information Act, read in light of this Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), prohibit the Court from weighing the public interest in collective bargaining as part of the balancing process. Neither the Privacy Act nor FOIA specifies the factors that a court must consider in applying the FOIA exemption 6 standard. Further, *Reporters Committee* applied the "clearly unwarranted invasion of personal privacy" standard in

the entirely different context of a request for information predicated exclusively upon the Freedom of Information Act, where no other Congressionally mandated disclosure interest existed.

Despite the fact that *Reporters Committee* did not address the issue, some of the lower courts have felt constrained to employ its definition of the public interest side of the balance, even in cases arising originally under the labor statute.<sup>5</sup> The result of this mechanical application of *Reporters Committee* is the frustration of Congressional intent under the labor statute to arm federal sector unions with the information they need to effectively represent employees both at the bargaining table and in the administration of the contract.

The Court, accordingly, should now clarify that when provision of information to the union is otherwise required by the labor statute, determining whether a privacy invasion is "warranted" under 5 U.S.C. 552(b)(6) requires the consideration of the public interests that statute serves.

<sup>3</sup> Privacy Act of 1974, 5 U.S.C. 552a.

<sup>4</sup> 5 U.S.C. 552.

<sup>5</sup> *FLRA v. United States Department of Defense, Army & Air Force Exch. Serv.*, 984 F.2d 370 (10th Cir. 1993); *FLRA v. United States Department of Defense*, 977 F.2d 545 (11th Cir. 1992); *Department of Navy, Navy Exchange v. FLRA*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of Navy, Navy Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA v. Department of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. United States Department of the Navy, Naval Communications Unit*, 941 F.2d 49 (1st Cir. 1991); *FLRA v. Department of Treasury*, *supra*.

## ARGUMENT

### DISCLOSURE OF FEDERAL EMPLOYEES' NAMES AND HOME ADDRESSES TO THEIR ELECTED BARGAINING REPRESENTATIVE IS NOT PROHIBITED BY THE PRIVACY ACT

Section 7114(b)(4) of the labor statute establishes the duty of an agency "to furnish to the exclusive representative . . . upon request and to the extent not prohibited by law, data . . . (B) which is reasonably available and necessary for full discussion, understanding, and negotiation of subjects within the scope of collective bargaining." In *Farmers Home Administration, Finance Office, St. Louis, Missouri*, 23 F.L.R.A. 788 (1986)<sup>6</sup> the FLRA held that the obligation to furnish "necessary" data required employer agencies to provide unions with employees' names and home addresses to enable them to effectively communicate with their constituents and discharge their representational responsibilities.

The FLRA's conclusion regarding the employer's obligation under the labor statute to provide home addresses is consistent with private sector precedent,<sup>7</sup> has been uniformly affirmed by the courts of appeals,<sup>8</sup> and is not

<sup>6</sup> *Aff'd in substantial part and remanded sub nom. Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), vacated and remanded, 488 U.S. 1025 (1989).

<sup>7</sup> Private sector case law "generally provides strong guidance in parallel public sector matters." *Department of the Treasury*, 884 F.2d at 1458 (R. Ginsburg, J., concurring). It has been used specifically to guide the interpretation of section 7114(b)(4). See *North Germany Area Council v. FLRA*, 805 F.2d 1044, 1048 (D.C. Cir. 1986); *American Federation of Government Employees v. FLRA*, 793 F.2d 1360, 1363-64 (D.C. Cir. 1986).

<sup>8</sup> *Department of the Navy v. FLRA*, 840 F.2d 1131, 1137-39 (3d Cir. 1988), cert. dismissed, 488 U.S. 881 (1988); *Federal Labor Relations Authority v. Department of the Treasury*, 884 F.2d at 1449-50; *Department of the Air Force v. FLRA*, 838 F.2d 229, 231-32 (7th Cir. 1988); *Department of Agriculture v. FLRA*, 836 F.2d

challenged here. Instead, the government argues that the Privacy Act (5 U.S.C. 552a), forbids agencies from disclosing home addresses to a union under the labor statute, because—in accordance with *Reporters Committee*—a member of the public could not have secured that information by making a request directly under the Freedom of Information Act. That contention is meritless.

#### A. The Privacy Act and the Freedom of Information Act Prohibit the Disclosure of Personal Information Only Where a Clearly Unwarranted Invasion of Personal Privacy Would Result

The Privacy Act of 1974 establishes a general prohibition against an agency's disclosure of information about an individual without the subject's written consent. 5 U.S.C. 552a(b). The Act was "passed largely out of concern over 'the impact of computer data banks on individual privacy.'" *Reporters Committee*, 489 U.S. at 766, quoting H.R. Rep. No. 93-1417, p. 7 (1974). Among the thirteen exceptions to the Act's general prohibition, is an exception for disclosures "required under [5 U.S.C. 552]" (FOIA). 5 U.S.C. 552a(b)(2).

While the Privacy Act establishes a general prohibition against the release of records, FOIA "implements 'a general philosophy of full agency disclosure.'" *Department of Air Force v. Rose*, 425 U.S. 352, 360 (1976), quoting S. Rep. 813, 89th Cong. 1st Sess. 3 (1965). As this Court has observed, "unless the requested material falls within one of [the] nine statutory exemptions, FOIA requires that records and materials in the possession of federal agencies be made available. . . ." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978); see 5 U.S.C. 552(a)(3). FOIA "places the burden on

1139, 1142 (8th Cir. 1988), vacated and remanded, 488 U.S. 1025 (1989); *Department of Health and Human Services v. FLRA*, 833 F.2d 1129, 1131-34 (4th Cir. 1987); *AFGE, Local 1760 v. FLRA*, 786 F.2d 554, 557 (2d Cir. 1986).

the agency to justify the withholding of any requested documents." *Department of State v. Ray*, 112 S.Ct. 541, 547 (1991).

FOIA creates only a limited exception from its disclosure requirements pertaining to records that contain personal information. Material in "personnel and medical and similar files" are exempt from disclosure *only* when their release "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b) (6). This exemption—which is to be "narrowly construed" (*Rose*, 425 U.S. at 366)—was designed "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (emphasis added).

**B. Disclosure of Names and Home Addresses to the Union Does Not Result in an Unwarranted Invasion of Personal Privacy Because the Public Interests Served by the Disclosure Outweigh the Minor Privacy Interests At Stake**

FOIA exemption 6 thus prohibits only "unnecessary" or "unwarranted" personal disclosures. All parties agree that to determine whether a privacy invasion is "warranted" a balance must be struck between the weight of the privacy interests at stake and the public interest in the disclosure. As the courts of appeals that have considered the question have overwhelmingly found, if the public interest in collective bargaining is considered, the balance of interests clearly favors the disclosure of names and addresses to the union.<sup>9</sup>

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<sup>9</sup> *FLRA v. U.S. Department of Defense*, 975 F.2d 1105, 1110-1111 (5th Cir. 1992); *FLRA v. Department of the Navy, Navy Resale and Services Support Office*, 958 F.2d 1490, 1496-97 (9th Cir. 1992); *Department of the Navy v. FLRA*, 840 F.2d at 1137; *Department of the Air Force v. FLRA*, 838 F.2d at 233; *Department of Health and Human Services v. FLRA*, 833 F.2d at 1135-

1. On the one hand, there is a strong statutorily based public interest in providing unions with information that is "relevant and necessary" to the collective bargaining process. Congress has determined that collective bargaining in the federal sector "safeguards the public interest" and "contributes to the effective conduct of public business." 5 U.S.C. 7101(a)(1). Therefore, it has found, "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. 7101(2).

The employer's statutory obligation to provide necessary information to the union serves this public interest directly. As this Court has observed in the analogous context in the private sector, good faith bargaining cannot take place when the employer withholds relevant information from the union. *See NLRB v. Acme Industrial Company*, 385 U.S. 432, 439 & n.6 (1967); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153 (1956). The concerns that led the Court to acknowledge this principle are no different in the federal sector.<sup>10</sup> Indeed, in section 7114(b)(4) Congress explicitly enacted into law the obligation to provide relevant information that in the private sector had been implied from the duty to bargain in good faith. Provision of names and addresses to the union, moreover, facilitates effective communication, which, in turn, assists the union in discharging its duties, and promotes the fullest possible exercise of employees' rights under the labor statute.

In that regard, there is no basis for the government's self-serving assertions that the union has ample opportunity to contact employees at work and that it can readily gather employees' addresses itself. (Pet. Br. at 28-29). These assertions are directly inconsistent with

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1136; *AFGE, Local 1760 v. FLRA*, 786 F.2d at 556-557; *see also FLRA v. Department of Treasury*, 884 F.2d at 1459 (R. Ginsburg, J., concurring).

<sup>10</sup> *See FLRA v. Department of the Treasury*, 884 F.2d at 1458 (R. Ginsburg, J., concurring).

the FLRA's opinion, based upon its expertise in the field of federal sector labor relations, that alternative means of communicating at the worksite are ineffective and impractical. Thus, the FLRA has recognized, as the National Labor Relations Board did before it,<sup>11</sup> that alternative means of communicating are unreliable and that home mailings are qualitatively superior to other forms of communication.<sup>12</sup>

Indeed, access to employees' home addresses is even more important in the federal sector because bargaining units are generally quite large, and often dispersed over a large geographic area, sometimes nationwide. There is no other effective method of communicating with this large, dispersed group of individuals—particularly when the union needs to impart time-sensitive information or reach the unit as a whole.<sup>13</sup>

<sup>11</sup> *E.g. Magma Copper Co.*, 208 N.L.R.B. No. 53 (1974).

<sup>12</sup> The FLRA has noted that home mailings are "fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency." They place "the content, timing and frequency of the communication . . . completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time constraints inherent in their work environments and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present." *Farmers Home Administration*, 23 F.L.R.A. at 796-797.

<sup>13</sup> In our experience, bulletin boards, distribution racks and hand-billing do not provide a comprehensive means of communicating with employees and are wholly unsatisfactory to communicate lengthy messages or solicit employee opinion. Desk drops are difficult to use because union officers are forbidden to enter other work areas while work is being performed and, in any event, cannot themselves engage in distributions except during their off duty time. Desk drops are also subject to agency interference. Stewards cannot provide a direct communications link to employees; the

2. On the other hand, disclosure of employees' names and home addresses to their bargaining representative has a *de minimis* effect upon their personal privacy when measured by "the characteristics revealed by virtue of being on the . . . list, and the consequences likely to ensue." *Department of State v. Ray*, 112 S.Ct. 541, 548 n.12 (1991).

Names and home addresses are publicly available from a number of sources, including motor vehicle and licensing records, voting lists, real property records, and telephone books. The only additional piece of "private" information that can be gleaned from a list of names and home addresses provided to the union is the fact of federal employment; employees can hardly be said to have a significant interest in keeping the fact of their employment hidden from their bargaining representative.

Further, the only consequence that will ensue from the disclosure of the information to the union is receipt of correspondence. There is every reason to believe, contrary to the government's suggestions (Pet. Br. at 21-22), that this correspondence will not be an unwelcome "disturbance" to most employees. Unlike the purveyors of "junk mail" the union does not represent an outside commercial interest; it represents the employees' *own* interests. And even where an employee is not interested in receiving correspondence from the union, "mail does not substantially impinge on seclusion, the addressee may send it to the circular file." *Department of the Air Force, Scott Air Force Base v. FLRA*, 838 F.2d 229, 232 (7th Cir.), cert. dismissed, 488 U.S. 880 (1988); *accord: FLRA v. Navy, Naval Ship Parts Control Center*, 966 F.2d 747, 759 (3d Cir. 1992) (*en banc*).

The government's suggestion that unions will use the lists of names and home addresses for purposes other

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average steward/employee ratio in NTEU units is 1/50, and employees are not permitted to spend work time discussing union matters in any event.

than communicating with employees about collective bargaining matters (Pet. Br. at 22) is meritless. As the Ninth Circuit observed, “there is no evidence that the unions plan to sell the lists, advertise, or otherwise seek commercial advantage through its mailings.” *FLRA v. Department of the Navy, Naval Resale and Services Support Office*, 958 F.2d 1490, 1495 (1992); *see also FLRA v. Navy, Naval Ship Parts Control Center*, 966 F.2d at 759. Indeed if the government really considered this a serious risk, an agency could easily neutralize it by seeking a promise of confidentiality before releasing the addresses or by explicitly including such a promise in the collective bargaining agreement. *See* 966 F.2d at 760; *cf. NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 414 (1st Cir. 1988).<sup>14</sup>

There is similarly no merit to the government’s suggestion that employees who are not union members are especially likely to suffer an invasion of privacy when they receive mail from their elected representative at home (Pet. Br. 21). The fact that an employee does not join the union does not necessarily or even logically imply that the employee has no interest in its activities on his or her behalf, any more than a resident of a Con-

<sup>14</sup> Further a union that misused the lists would likely forfeit its right to obtain them in the future and could be subject to criminal penalties (*see* 5 U.S.C. 552(a)(i)(3)).

The government’s contention (Pet. Br. 22) that significant privacy interests are at stake because disclosure of employee names and home addresses cannot be limited to the union, but must be allowed for any requester is based upon a misapplication of the *Reporters Committee* case. As we show *infra*, the union’s right to obtain information under the labor statute is broader than the right of a member of the public—like a commercial entity—who seeks disclosure solely pursuant to FOIA; accordingly, a ruling that unions may obtain names and addresses pursuant to the labor statute portends no greater release of that information than that statute authorizes. *FLRA v. Navy, Naval Ship Parts Control Center*, 966 F.2d at 759.

gressional district would necessarily resent informative materials from a legislator to whose campaign he did not provide support or whose candidacy he opposed. Our experience shows, in fact, that those federal employees who do not become union members most often are simply ignorant of the union’s existence or services, are apathetic, or are disinclined to pay dues.

At the same time, if a federal employee has a “specific reason for keeping their home address out of union hands” (Pet. Br. at 21) the statute provides them protection. The FLRA has been delegated the statutory responsibility for considering “legitimate claims that disclosure will impose undue burdens” either on employees or on agencies, just as the NLRB shoulders that responsibility in the private sector. *Treasury*, 884 F.2d at 1450; *see Farmers Home Administration*, 23 F.L.R.A. at 798; *cf. Detroit Edison v. NLRB*, 440 U.S. 301, 317-321 (1979) (ruling that in light of privacy concerns private sector union not entitled to obtain employees’ test scores despite their relevance). Should the employing agencies disagree with the FLRA’s balancing of interests in a particular case (*see* Pet. Br. at 21-22, 25-26), they have resort to the courts of appeals. *See* 5 U.S.C. 7123(a).

### C. Considering the Public Interest in Collective Bargaining Is Consistent with the Terms of the Privacy Act and the FOIA

Although the government would assign greater weight to the privacy interests implicated by the disclosure of names and addresses to the union, it does not deny that those interests are outweighed by the public interest in disclosure embodied in the labor statute. Instead, it argues that the terms of the Privacy Act and the FOIA, as interpreted by this Court in *Reporters Committee*, preclude the consideration of those public interests at all.

1. Thus, the government observes that the Privacy Act contains no exemption for information that promotes col-

lective bargaining (Pet. Br. 15; 17), that Privacy Act exemption 2 “directs attention to FOIA and only to FOIA” and that “nothing in FOIA provides for the release of information that promotes collective bargaining.” *Id.* at 15. It further recites the principle that the Court cannot “‘create an exception where Congress has declined to do so.’” Pet. Br. at 17, quoting *Freytag v. Commissioner of Internal Revenue*, 111 S.Ct. 2631, 2636 (1991).

The government’s observations, however, are not pertinent. There is no need to create new exceptions to the Privacy Act to authorize the release of information to the union that it requires to discharge its statutory responsibilities. The Privacy Act already has an exemption for disclosures required by FOIA and FOIA’s express terms mandate the release of *any* information—including information that promotes collective bargaining—unless one of its exemptions applies.

The FOIA exemption upon which the government relies only permits an agency to refuse to disclose information contained in “personnel and medical files and similar files” where it “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. 552(b)(6). The courts have held that determining whether a privacy invasion is “warranted” requires balancing privacy interests against countervailing interests in disclosure. FOIA itself does not specify the factors for evaluating the competing interests in privacy and in disclosure; those factors have been supplied by the judiciary when necessary to apply the “clearly unwarranted invasion of personal privacy” standard to the cases before them.

The government, therefore, can identify nothing in the language of any of the statutory provisions that precluded the FLRA from considering the public interests served by the labor statute when it applied that standard here. Its

effort to ground its position in the statutory text is, accordingly, unavailing.

**D. Considering the Public Interests Served By Collective Bargaining Is Not Inconsistent With *Reporters Committee* and Is Necessary to Effectuate Congressional Intent Under the Labor Statute**

Because there is nothing in the Privacy Act or in FOIA itself that precluded the FLRA from considering the public interest in collective bargaining in assessing whether any invasion of privacy was warranted, the government is left to argue that this Court’s decision in *Reporters Committee* requires that result. *Reporters Committee*, however, applied the “unwarranted invasion of personal privacy” standard in an entirely different context.

Thus, *Reporters Committee* concerned a request by representatives of the news media, predicated upon the Freedom of Information Act, for disclosure of “rap sheet” information. The Court held that rap sheets on file with the Federal Bureau of Investigation are exempt from disclosure by virtue of FOIA exemption 7(c), which excludes from disclosure records or information compiled for law enforcement purposes, “but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. 552(b)(7)(C).

The Court reached its conclusion by balancing the strong privacy interests that were at stake against the public interest in disclosure. The Court measured the public interest solely in terms of the policies Congress sought to promote in FOIA. 489 U.S. at 771-772. It held that whether or not disclosure of the rap sheet information was “warranted” depended upon its relationship to “the basic purpose of the Freedom of Information Act, ‘to open agency action to the light of public scrutiny.’” *Id.* at 772, quoting *Rose*, 425 U.S. at 372. Because FOIA was intended to give every member of the

public an equal right to disclosure, the Court ruled that the identity of the requester and the purpose for which he sought the information should not be a factor in assessing whether a privacy invasion is "warranted". *Id.* at 771.

The analysis the Court applied in *Reporters Committee* cannot be divorced from the context in which that case arose. In *Reporters Committee*, the only statutory basis for the disclosure request at issue was FOIA; for that reason, the only point of reference to assess whether the invasion of privacy was "unwarranted" was the public interest served by FOIA itself. *Reporters Committee*, in fact, did not purport to base its exposition of the balancing test upon any particular statutory language, but rather upon Congressional intent. The Court used the purpose of FOIA as the sole measure of the public interest in disclosure in an effort to be faithful to the Congressional intent underlying the disclosure provision the requesters had invoked.

Here, refusing to consider the public interests served by the labor statute cannot possibly protect the interests that Congress intended to promote. On the contrary, mechanical application of the factors in *Reporters Committee* to cases that arise under the labor statute undermines the important policies that statute serves. See *FLRA v. Department of Treasury*, 884 F.2d at 1457 (R. Ginsburg, J., concurring) (observing that it is "unlikely" that Congress intended to deny federal sector unions lists of names and home addresses of a kind routinely provided in the private sector); *id.* at 1458 ("nearly certain that Congress did not anticipate the outcome [that application of] *Reporters Committee* requires us to reach in this case").

By ignoring Congress' intent to afford unions a special right of access to information in recognition of their responsibilities in the federal labor-management relations program, the government would place the union in the

same position it would have occupied had the labor statute never been enacted—equivalent to any member of the public who seeks information from the government under FOIA. That anomalous reading of the statutes at issue has enormous practical consequences that directly collide with Congress' express recognition that labor organizations and collective bargaining in the federal civil service promote the public interest.

To discharge their function as collective bargaining representative, unions often need information that is significantly more personal than an employee's home address. Such information can include, among other things, payroll records, disciplinary files, performance evaluations and job applicant information.<sup>15</sup> Only by happenstance will a union's request for such information relate to the basic purpose of FOIA—to ensure that the government's activities are opened to public scrutiny—because the union will always be seeking the data for an entirely different purpose that stems from its relationship to the government as *employer*.

In many and perhaps most cases, contrary to the government's argument (Pet. Br. 26-27), the data the union requests will be completely useless if identifying details are deleted. In a typical discriminatory promotion case, for example, the union will need to review the personnel folder of the individual who was selected for promotion to assess whether discrimination occurred and whether to file a grievance. In assessing the strength of a union officer's complaint of retaliation, the union will need to know what actions the agency has taken against other similarly situated employees. When an agency is suspected of violating the Fair Labor Standards Act, the

<sup>15</sup> See *FLRA v. Department of Treasury*, 884 F.2d at 1460 (R. Ginsburg, J., concurring), citing *AFGE v. FLRA*, 793 F.2d 1360 (D.C. Cir. 1986) (disciplinary records); *Internal Revenue Service and NTEU*, 25 F.L.R.A. 181 (1987) (performance appraisals).

union will need payroll records to directly contact employees who have worked overtime, to determine whether to file a grievance on their behalf.

In passing the labor statute, "Congress unquestionably intended to strengthen the position of federal unions and to make collective bargaining a more effective instrument of the public interest." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 107 (1983). Yet, under the government's argument, the employer will have a monopoly on access to crucial information, for a union's information requests must be denied if even the most insignificant privacy interest is at stake, no matter how compelling its need for the information to act as bargaining representative.

In fact, if the government is correct, then Congress has *prohibited* the federal employer from providing unions with necessary data that the federal government, in its sovereign capacity, *requires* the private employer to supply. That result makes the government's position all the more anomalous, given Congress' intent to "arm federal unions with capacity closer to that of unions in the private sector." *FLRA v. Treasury*, 884 F.2d at 1461 (R. Ginsburg, J., concurring).

The disparity created cannot logically be justified (as the government seems to suggest—Pet. Br. at 28) by some greater legislative solicitude for the privacy of federal employees. The government identifies nothing in the Privacy Act or its legislative history to show any consideration of federal employee privacy, much less their privacy in relation to the collective bargaining process. On the contrary, the Privacy Act was enacted primarily in response to concerns about the improper public release of information that the government gathers from its citizens in its role as sovereign.

Further, and equally important, considering the public interests served by collective bargaining is not the least

bit inconsistent with the protection of employee privacy. *FLRA v. Navy, Naval Ship Parts Control Center*, 966 F.2d at 761. It merely allows a reasonable balance to be struck between privacy interests and the countervailing interests the labor statute serves. Cf. *Detroit Edison v. NLRB*, 440 U.S. at 317-321 (balancing employee privacy and union need for information for collective bargaining).

The government's analysis, by contrast, does not balance competing interests; as noted, it establishes a *per se* rule against disclosure when any privacy interest is implicated. To give full effect to all relevant Congressional policies, the Court should clarify that when a request is predicated upon another Congressional *enactment*—such as the labor statute—determining whether a privacy invasion is "warranted" requires consideration of the public interests that statute promotes.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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